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CONSENT DECREES IN THE STREAMING ERA: DIGITAL WITHDRAWAL, FRACTIONAL LICENSING, AND § 114(I)

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"I guess a good song is a good song is a good song, ya know."

-George Thorogood

I. INTRODUCTION: THE BIG PICTURE[1]

"If you ask most songwriters or music creators, June 30, 2016—the date the Dept. of Justice ruled on music licensing consent decrees—may go down in history as 'the day the music rolled over in its grave.'"[2] Despite the hyperbole, this sentiment has deep roots in the songwriting community. While the music business is no stranger to disruptive innovation (e.g., Napster), for the first time in decades judicial action seems to be the culprit of the disruption rather than the commercial innovation itself.[3] The commercial innovation in question: music streaming; the judicial (in)action: failure to update consent decrees.[4] Although streaming democratized music access by supplying consumers with robust, legally-obtained music catalogs, songwriters argue that they have been inadequately compensated.[5] The wrinkle in their argument is that Apple,[6] Amazon,[7] Google,[8] Pandora,[9] Spotify,[10] Tidal,[11] and the Department of Justice (DOJ) all

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[1] BIG L, THE BIG PICTURE (Rawkus Entertainment 2000).

[2] Brittany Hodak, *U.S. Dept. of Justice Deals Crushing Blow To Songwriters*, FORBES (July 1, 2016, 1:52 PM), http://www.forbes.com/sites/brittanyhodak/2016/07/01/u-s-dept-of-justice-deals-crushing-blow-to-songwriters/#2790232e1127. "A[SCAP] CEO Elizabeth Matthews said the decision 'puts the U.S. completely out of step with the entire global music marketplace, denies American music creators their rights and potentially disrupts the flow of music without any benefit to the public.'" Hannah Karp, *Music Publishers Decry Justice Department Licensing Decision*, WALL ST. J. (Aug. 4, 2016, 12:39 PM), http://www.wsj.com/articles/music-publishers-decry-justice-department-licensing-decision-1470328754.

[3] *See* Andrew Langer, *Music Industry Presses DOJ to Change Rules of Game*, HILL (Mar. 18, 2016, 12:30 PM), http://thehill.com/blogs/congress-blog/judicial/273421-music-industry-presses-doj-to-change-rules-of-the-game.

[4] 35B C.J.S. Fed. Civ. P. § 1149 (2015) (explaining that consent decrees are agreements signed by parties accused of wrongdoing to refrain from certain activity and affirmatively perform other activities, all while maintaining deniability).

[5] John Seabrook, *Will Streaming Music Kill Songwriting?*, NEW YORKER, (Feb. 8, 2016), http://www.newyorker.com/business/currency/will-streaming-music-kill-songwriting.

[6] As of September 2016, Apple Music had 17 million subscribers. Murray Stassen, *Overnight News from Around the World: Thursday, September 8*, MUSIC WEEK (Sept. 8, 2016, 7:40 AM) http://www.musicweek.com/digital/read/overnight-news-from-around-the-world-thursday-september-8/065896. While Apple is yet to match the usership of Spotify's streaming services, one must recognize that Apple controls a behemoth share of the digital sound recordings business with iTunes. Tim Ingham, *Spotify is Miles More Popular than Apple Music (On Google)*, MUSIC BUS. WORLDWIDE (Oct. 5, 2015), http://www.musicbusinessworldwide.com/spotify-miles-popular-apple-music-google/.

[7] Amazon launched a three-tiered subscription service charging $7.99 per month for the standard package. Dan Rhys & Andrew Flanagan, *Amazon Launches Three-Tiered Music Unlimited Streaming Service*, BILLBOARD (Oct. 12, 2016), http://www.billboard.com/articles/news/7541029/amazon-music-unlimited-launch.

[8] Google's YouTube made approximately $9 billion in revenue in 2015. Tim Ingham, *YouTube Earnt $9BN in Revenue Last Year, Towering Over Spotify*, MUSIC BUS. WORLDWIDE (Jan

disagree. So who is correct, or more usefully, where should one draw the line to adequately compensate authors and support the general public?

Streaming music songwriter royalties derive from the copyright owner's exclusive right to public performance, as defined by the Copyright Act of 1976.[12] PROs collect these royalties through the issuance of blanket licenses, granting the licensee "the right to perform *all* the compositions controlled by all the publishers affiliated with that society."[13] In other words, for efficiency pur-

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1, 2016), http://www.musicbusinessworldwide.com/youtube-will-earn-9bn-in-revenue-this-year-towering-over-spotify/. Estimates claim $5 billion of those earnings is returned to the pockets of rights holders. *Id.*

[9] Pandora posted yearly revenue of $1.16 billion in 2015. Glenn Peoples, *Pandora Brought in $1.16 BIllion[sic] Last Year, But New Listeners Seem Hard to Find,* BILLBOARD (Feb 11, 2016, 4:41 PM), http://www.billboard.com/biz/articles/6874834/pandora-brought-in-116-billion-last-year-but-new-listeners-seem-hard-to-find. Likely due to market pressures resulting from a 73% decrease in market capitalization over the span of two years, Pandora entered the subscription streaming market. Michele Chandler, *Pandora Posts Q4 Earnings Miss as Listener Base Tumbles*, INV. BUS. DAILY: TECH. (Feb. 11, 2016), http://www.investors.com/news/technology/pandora-posts-q4-earnings-miss-as-listener-base-tumbles/.

[10] In 2014, Spotify, the world's largest music subscription service, boasted revenues of $1.22 billion. Glenn Peoples, *Spotify Losses Accelerate as Revenue Grows to $1.22 Billion*, BILLBOARD (May 9, 2015, 3:30 PM), http://www.billboard.com/biz/articles/news/digital-and-mobile/6561131/spotify-losses-accelerate-as-revenue-grows-to-122. Spotify finished 2014 with 15 million subscribers and 45 million free users, globally. *Id.* Current reports place the company with over 40 million paid subscribers. Andrew Flanagan, *8.1 Percent of What? Why the Record Business is Celebrating*, BILLBOARD (Sept 21, 2016, 2:57 PM), http://www.billboard.com/biz/articles/news/record-labels/7518037/81-percent-of-what-why-the-record-business-is-celebrating.

[11] "TIDAL is available in more than 46 countries, with a more than 40 million song catalog and nearly 90,000 high quality videos." TIDAL, ABOUT US, http://news.cision.com/tidal (last visited Jan. 31, 2017).

[12] *See* 17 U.S.C. § 106(4) (2012).

[13] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 242 (9th ed., Simon & Schuster 2015) (1991) (emphasis added); *see also* 17 U.S.C. § 114(d)(3)(E)(ii) (2012). These blanket licenses take many collection forms, but generally, PROs use flat dollar fees or percentages of gross revenues. JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY AND SUCCESS: THE INSIDER'S GUIDE TO MAKING MONEY IN THE MUSIC BUSINESS 313 (7th ed., Schirmer Trade Books) (2011). Fees may alternatively take the form of per-subscriber fees, gross revenue fees, net receipt fees, fees based on music usage, and many other objective factors. *Id*. Fees have traditionally been collected from licensing "terrestrial, satellite and internet radio stations, broadcast and cable television stations, online services, bars, restaurants, live performance venues, and commercial establishments that play background music." U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 33 (2015) https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [hereinafter MUSIC MARKETPLACE]; *see also* Todd Brabec, *The Performance Right Juncture: Compositions*, MUSIC BUS. J., (May 2015), http://www.thembj.org/2015/04/the-performance-right-juncture-i/#sthash.h3ikpPCw.dpuf [hereinafter *The Performance Right Juncture*]. Terrestrial radio stations are represented by the Radio Music License Committee, a non-profit with the goal of "achiev[ing] fair and reasonable license fees with the music licensing organizations." RADIO MUSIC LICENSE COMMITTEE, http://www.radiomlc.org/ (last visited Jan. 31, 2017). Small Business establishments are normally exempted from obtaining a license based on square footage thresholds. 17 U.S.C. § 110 (2012); *see also Frequently Asked Questions*, ASCAP, http://www.ascap.com/licensing/licensingfaq.aspx#general (last visited Jan. 31, 2017).

poses, PROs pool copyrights and issue collective licenses to music users. Thereafter, PROs pay their affiliated member publishers pro-rated shares of their net income.[14] For most of the twentieth century, blanket licenses proved necessary to adequately cope with the prohibitive administrative task of manually monitoring every live performance of a song.[15] Recently, however, songwriters have criticized the collection efforts of the two largest PROs—ASCAP[16] and BMI[17]—for inadequately negotiating new media licenses.[18]

Particularly concerning in this calculus is the fact that the DOJ exerts practical control over ASCAP and BMI through seventy-five-year-old consent decrees.[19] While the DOJ implemented these consent decrees to prevent "the aggregation of public performance rights in violation of Section 1 of the Sherman Act,"[20] many argue that the digitization of information has rendered them ineffective.[21]

Taking matters into its own hands, Sony/ATV Music Publishing (Sony/ATV) attempted to directly negotiate new media rights with digital service providers.[22] Unfortunately, the District Court for the Southern District of

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[14] PASSMAN, *supra* note 13. The payment split is normally 50/50. *Id.* However, contract law allows the writer to negotiate for a part of the publisher's 50% share, if the parties see fit. *The Performance Right Juncture*, *supra* note 13.

[15] *Music Licensing History*, NAT'L RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE, http://www.nrbmlc.com/music-licensing/music-licensing-history/ (last visited Jan. 31, 2017).

[16] ASCAP is home to more than 600,000 music creator members across all genres. *About Us*, ASCAP, http://www.ascap.com/ (last visited Jan. 31, 2017).

[17] "BMI is a non-profit music licensing organization [working] on behalf of approximately 400,000 affiliated songwriters, composers, and music publishers . . . ." Broad. Music, Inc. v. DMX, Inc., 726 F. Supp. 2d 355, 356 (S.D.N.Y. 2010), *aff'd*, 683 F.3d 32 (2d Cir. 2012). BMI was founded in 1939 by the National Association of Broadcasters (NAB). *Id.*

[18] *See* Seabrook, *supra* note 5. Michele Lewis, from the band "Wings," had nearly 3 million plays on Spotify and reportedly received a check for seventeen dollars and seventy-two cents. *Id.*

[19] *See* MUSIC MARKETPLACE, *supra* note 13. For context, ASCAP's 1941 consent decree remains in effect today. Broad. Music Inc. v. CBS, 441 U.S. 1, 11 (1979). ASCAP's consent decree was amended in 1950 and 2001. *Id.* ASCAP and the DOJ agreed to a revised consent decree in 1950 known as the Amended Final Judgment (AFJ) with the improvements of adding a rate court and prohibiting discrimination between similarly situated licensees. United States v. Am. Soc'y of Composers, Authors & Publishers, 1950–51 Tr. Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) [hereinafter AFJ]. The 1990 amendment prohibited ASCAP from interfering with member's right to license directly. United States v. Am. Soc'y of Composers, Authors and Publishers, Civil Action No. 41–1395 (June 11, 2001) [hereinafter AFJ2]. BMI's original consent decree was replaced in 1966, but that 1966 version continues to control. *Broad. Music Inc.*, 441 U.S. at 12. BMI's consent decree was amended in 1994. *Id.*

[20] Department of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, (Aug 4, 2016) [hereinafter DOJ Statement] (citing 15 U.S.C. § 1) https://www.justice.gov/atr/file/882101/download.

[21] Seabrook, *supra* note 5.

[22] Ben Sisario, *Sony Threatens to Bypass Licensers in Royalties Battle*, N.Y. TIMES (July 10,

New York barred Sony/ATV from withdrawing partial digital licensing rights from its affiliated PRO.[23] Searching for alternative solutions, publishers and PROs petitioned the DOJ to amend the consent decrees to permit publishers to directly negotiate streaming rights with digital services providers like Spotify and Pandora.[24] In 2014, the U.S. Department of Justice opened a review of ASCAP and BMI's consent decrees, calling for public comment.[25] However, after receiving comments regarding partial withdraw and several other issues,[26] the DOJ made an about-face. In 2015, the DOJ shifted its focus to "whether the organizations' licenses have in fact conveyed the right to play partially owned works."[27] In other words, the DOJ questioned whether the consent decrees required a single PRO to issue a full license for a song only partially owned by

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2014), https://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0.

[23] *Antitrust Consent Decree Review*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 31, 2017). The period for comments to the DOJ closed at the end of 2014. *Id.*

[24] *Id.*

[25] *Id.*

[26] *See id.* The DOJ requested public comment regarding:

> Do the Consent Decrees continue to serve important competitive purposes today? . . . What, if any, modifications to the Consent Decrees would enhance competition and efficiency? . . . Do differences between the two Consent Decrees adversely affect competition? . . . How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why? . . . Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set? . . . Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to "rights of public performance?"

Id. Both ASCAP and BMI requested amendments to their rate-setting processes in the form of expedited arbitration panels rather than federal district courts. ASCAP, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 18, 22, 31 (Aug. 6, 2014 http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf. Strangely, BMI's current consent decree already requires disputes between writers or publishers ("members") and BMI to be settled through arbitration, so it seems that specialized arbitration panels would not be a giant leap in established methods of dispute resolution. BMI Consent Decree §§ VII.C (requiring all disputes with members to go through the arbitral institution American Arbitration Association). Similarly, "under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action antitrust suit involving local television stations, SESAC has agreed to a binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation." *The Performance Right Juncture*, *supra* note 13, at 2.

[27] *ASCAP and BMI Consent Decree Request for Public Comments 2015*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015 (last visited Jan. 13, 2017).

their affiliate, breaking with the historical practice of fractional licensing.[28]

At the end of the two-year review, "[t]he DOJ denied virtually all requests from music publishers and songwriters, and also ruled that each PRO [must] license 100% of a song for use, regardless of what percentage of the song a PRO represents."[29] The DOJ declared that the consent decrees "require ASCAP and BMI to offer full-work licenses," based not only on textual interpretations, but because "only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses."[30] BMI promptly challenged the DOJ's decision in court and Judge Louis L. Stanton "concluded: 'Nothing in the consent decrees neither bars fractional licensing, nor requires full-work licensing.'"[31] As the issue currently stands, the Justice Department has appealed Judge Stanton's ruling.[32]

Evidently, the stakes are high. PROs now account for over $2 billion in annual U.S. revenue.[33] This Comment seeks to summarize the legitimate concerns of opposing parties in order to provide a framework for analysis during the inevitable further legal review of the consent decrees. Parties must simultaneously weigh constitutional demands to "promote the progress of science and useful arts"[34] with freedom of contract and consumer protection. Accordingly, Part II explains the legal framework through which our ad hoc royalty system came to fruition.[35] Part III explains Partial Withdraw and analyzes arguments regarding whether ASCAP and BMI's consent decrees should be amended to permit publishers to negotiate directly with music service providers.[36] Part IV differentiates Fractional Licensing from Partial Withdraw, explains the most current issues under scrutiny, and analyzes party motivations.[37] Part V discusses

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[28] Fractional licensing is the "long-established industry practice of each rights owner greenlighting their particular portion of a song in order to establish a license." Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, BILLBOARD (July 30, 2015), http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for.

[29] Hodak, *supra* note 2.

[30] DOJ Statement, *supra* note 20, at 3.

[31] Emmanuel Legrand, *Judge Delivers Blow to the US Department of Justice on 100% Licensing*, MUSIC WEEK (Sept. 19, 2016, 8:21 AM), http://www.musicweek.com/publishing/read/judge-delivers-blow-to-the-us-department-of-justice-on-100-licensing/065977.

[32] Ed Christman, *Dept. of Justice Appeals BMI Consent Decree Decision*, BILLBOARD (November 11, 2016), http://www.billboard.com/articles/business/7573537/doj-appeal-bmi-consent-decree-decision-fractional-licensing.

[33] Todd Brabec, *The Performance Right—A World in Transition*, 31 ENT. & SPORTS LAW. 1, 37 (2015).

[34] U.S. Const. art. I, § 8, cl. 8 [hereinafter IP Clause].

[35] *See infra* Part II.

[36] *See infra* Part III.

[37] *See infra* Part IV.

the role 17 U.S.C. § 114(i) plays in exacerbating the DOJ and Rate Courts' decision-making processes.[38] Part VI proposes general solutions, and Part VII concludes.[39] In totality, this Comment seeks to determine whether and what changes must occur to sufficiently compensate competent songwriters for the public benefit.

II. BACKGROUND: PUBLIC PERFORMANCE

A. Music Copyright Primer

Music has two cognizable components: the *sound recording* and the *composition*.[40] Record Labels (Labels) monetize the sound recording—the recording of a specific performance in time; publishers[41] monetize the composition (colloquially the "song"[42])—that which has the capacity to be written or transcribed.[43] For imagery, if a compact disc (CD) represents the sound recording, sheet music represents the composition. Where artists record sound recordings,[44] songwriters write songs.[45]

While popular culture glorifies Labels, the sound recording around which the modern music business formed did not receive U.S. copyright protection until 1971.[46] The song, however, received protection over 100 years prior.[47] When

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[38] *See infra* Part V.

[39] *See infra* Part VI–VII.

[40] 17 U.S.C. § 102(a) (2012).

[41] Music publishers find users, issue licenses, collect monies, and pay writers. PASSMAN, *supra* note 13, at 235. Four major music publishers—Sony/ATV: 27.87%; Warner/Chappell Music: 17.49%, Kobalt Music Group: 13.98%; and Universal Music Publishing Group (UMPG): 13.31%—together control over 70% of the U.S. publishing market, as of the third quarter of 2016. Ed Christman, *Music Publishers in Q3: Who's Soaring & Who's Slipping*, BILLBOARD (Oct. 28, 2016, 11:10 AM), http://www.billboard.com/biz/articles/news/record-labels/7557696/music-publishers-in-2016-q4-whos-soaring-whos-slipping.

[42] *See e.g.*, the Grammy Foundation's use of the "Song of the Year" award for best composition.

[43] The U.S. Copyright Act of 1790 protected only "copies of maps, charts, and books." 1 Stat. 124, 1 Cong. Ch. 15. Thus, only the notes and lyrics of a song, which could be written on paper, gained copyright protection.

[44] While legal distinction separates the songwriter and the artist, in practice, many songwriters are also artists.

[45] Songwriters are often represented in major guilds like The Songwriters Guild of America (SGA) and the Nashville Songwriters Association (NSAI). MUSIC MARKETPLACE, *supra* note 13, at 19.

[46] Sound Recording Act of 1971, 85 Stat. at 392. That right only protects those works recorded on or after February 15, 1972. *Copyright Law Revision*, Part 3, Preliminary Draft for Revised U.S. Copyright Law § 10 (Sept. 1964); S. 543, 91st Cong. (1st Sess. 1969); H.R. 2512, 90th Cong. (1st Sess. 1967); S. 597, 90th Cong. (1st Sess. 1967).

[47] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; *see also* 17 U.S.C. § 102(a) (2012). The Copyright

the founders ratified the U.S. Constitution in 1788, Article 1 codified the purpose of copyright "[t]o promote the progress of science and useful arts."[48] Despite the sentiment, songwriters did not receive any real protection for another fifty years.[49] Nearly seventy years after that, Congress granted songwriters the exclusive right to publicly perform their compositions, eventually codifying that right in the Copyright Act of 1909[50] and reaffirming that right in the Copyright Act of 1976.[51]

When a songwriter creates an original work, often she will assign her copyright to a music publisher or hire the publisher to administer the song.[52] In turn, the publisher licenses uses of the song and collects fees from which the songwriter receives royalties.[53] Of those uses, the right to publicly perform[54] causes added frustration. For publishers, much less individual songwriters, the sheer quantity of public performances makes their exclusive right practically impossible to enforce. For example, imagine calling every bar, music venue,

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Act's formal terminology for songs is "musical work[s]." *Id.*

[48] U.S. Const. art. I, § 8, cl. 8.

[49] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; *Copyright Law Revision*, Part 3, Preliminary Draft for Revised U.S. Copyright Law § 10 (Sept. 1964). While Congress passed its first Copyright Act in 1790, compositions were not expressly covered until 1831, when congress amended the law to allow songwriters essentially the same rights as traditional literary authors, the rights to reproduce and distribute. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

[50] Copyright Act of 1909 § 23. This extended the limited duration term of songwriters' limited monopoly from twenty-eight years to fifty-six years. Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124.

[51] *See* 17 U.S.C. § 106(1)–(5) (2012) (stating that "the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) *in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly*; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly") (emphasis added).

[52] This transfer or license is contracted in consideration for a share of the profits earned from that exploitation as well as advances on future royalties. MUSIC MARKETPLACE, *supra* note 13, at 19. Advances are essentially loans recoupable to "finance the songwriter's writing efforts." *Id.* Publishers are represented primarily by the National Music Publishers Association (NMPA) and the Association of Independent Music Publishers (AIMP). *Id.*

[53] PASSMAN, *supra* note 13, at 235–36. Music publishers' duties include exploiting copyrights globally, securing uses for their writers' songs in audiovisual works, suing infringers, promoting new songs, negotiating fees, and issuing appropriate licenses. BRABEC & BRABEC, *supra* note 13, at 2–3.

[54] "To perform or display a work 'publicly' means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101 (2012).

and commercial retail establishment in the United States and convincing them to both account and pay fractions of a penny for each use of a song. Manifestly, public performance administration was too cumbersome.[55] Enter the PRO.

B. "The Genesis"[56] of U.S. Performance Royalty Collections

As folklore has it, composer Victor Herbert[57] visited Shanley's Café, an upscale restaurant in New York City in 1913.[58] Shanley's, like most restaurants, earned its income through the sale of food and drink, and charged no admission fee, despite a house orchestra accompanying the guests' dining experience.[59] On that fateful night, the orchestra played a relatively new, but popular song called "Sweethearts."[60] Unlucky for Shanley's, Victor Herbert was that song's author and he believed that Shanley's owed him remuneration for the public performance of his song.[61]

Around that same time, George Maxwell, the U.S. representative for the Italian publisher Recordi, was working with Giacomo Pucini,[62] Herbert's contemporary. Pucini, also upset that he did not receive public performances royalties in the United States, explained to Maxwell that the Italian Society of Authors and Publishers licensed such performances in Italy through an aggregate model.[63] A user would purchase an annual blanket license for access to all of

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[55] Individual publishers, although highly specialized, traditionally did not have the bandwidth to collect monies owed throughout the country. *Music Licensing History*, NAT'L RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE, http://www.nrbmlc.com/music-licensing/music-licensing-history/ (last visited Dec. 25, 2015).

[56] NAS, *The Genesis*, ILLMATIC (Columbia Records 1994).

[57] Victor August Herbert, a prolific composer, accomplished cellist, and noted conductor, had substantial success in his composition of operettas—his most notable being "Babes in Toyland" (1903), later adapted in Laurel and Hardy's 1934 film version reissued as March of the Wooden Soldiers, "The Red Mill" (1906), and "Sweethearts" (1913). *Biography: Victor Herbert*, SONGWRITERS HALL OF FAME, http://www.songwritershalloffame.org/exhibits/bio/C290 (last visited Feb. 21, 2016). He also composed for The Fall of a Nation, the first full length feature film sequel to the controversial Birth of a Nation. *Id.*

[58] AMBER NICOLE SHAVERS, THE LITTLE BOOK OF MUSIC LAW 43 (2013).

[59] BRABEC & BRABEC, *supra* note 13, at 344.

[60] *Id.; see also Sweethearts*, GUIDETOMUSICALTHEATRE.COM, http://www.guidetomusicaltheatre.com/shows_s/sweethearts.htm (last visited Mar. 25, 2016).

[61] SHAVERS, *supra* note 58, at 43. Herbert was convinced that the public performance of his song warranted a separate payment apart from the original sheet music. *See Biography: Victor Herbert*, SONGWRITERS HALL OF FAME, http://www.songwritershalloffame.org/exhibits/bio/C290 (last visited Feb. 21, 2016).

[62] *Id.* at 41–43. Giacomo Antonio Domenico Michele Secondo Maria Puccini was a celebrated composer whose opera's included "La Bohème," "Tosca," "Madama Butterfly," and "Turandot." Giacomo Puccini, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/biography/Giacomo-Puccini (last visited February 23, 2016).

[63] SHAVERS, *supra* note 58, at 41.

the works in a PRO's catalog.[64] Armed with Pucini's idea, Maxwell, Nathan Burkan (Maxwell's lawyer), and their newly aggravated friend, Herbert, organized a 1914 February meeting to implement a similar business model,[65] thus creating ASCAP.[66]

To collect public performance royalties where individual writers and publishing companies lacked bandwidth, ASCAP had "copyright holders giv[e] their permission exclusively to ASCAP to license their music for use by the venues. In turn, venues would pay for blanket licenses from ASCAP that would grant the venues the right to play all of the music in ASCAP's library."[67] There was, however, one major obstacle: "no legal authority [existed] to enforce [a large portion of] the licensing system."[68] Under the Copyright Act of 1909, songwriters had an exclusive public performance right only for works performed "for profit."[69] Venues argued that when public performances were secondary sources of income, those performances did not qualify as "for-profit."[70] In other words, Shanley's Café argued that its background music was not for-profit. Outside of concert halls and theaters, PROs had an understandably difficult time convincing businesses to pay for licenses that they did not believe were necessary.[71]

Conveniently, Herbert's aggravation with Shanley's Cafe offered the perfect test case to fight this interpretation.[72] In 1915, Herbert and ASCAP filed suit in the District Court for the Southern District of New York.[73] There, a young Judge Learned Hand dealt a blow to ASCAP by following the precedent of the recently decided *Church Co. v. Hilliard*,[74] holding that because Shanley's

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[64] HARK HALLORAN, THE MUSICIANS BUSINESS AND LEGAL GUIDE 129 (4th ed. 2008). This was a flat rate annual fee. *Id.*

[65] SHAVERS, *supra* note 58, at 44. Other charter members included John Philip Sousa, Jerome Kern, and Irving Berlin. BRABEC & BRABEC, *supra* note 13, at 311.

[66] SHAVERS, *supra* note 58, at 44. "[T]hose who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." Broadcast Music v. CBS, 441 U.S. 1, 6 (1978).

[67] SHAVERS, *supra* note 58, at 44–45.

[68] *Id.* at 45.

[69] Copyright Act of 1909, ch. 15, 1 Stat. 124.

[70] SHAVERS, *supra* note 58, at 46.

[71] *Id.*

[72] *Id.* at 47.

[73] Herbert v. Shanley Co., 222 F. 344 (S.D.N.Y. 1915).

[74] In *John Church Co. v Hilliard*, a music publisher sued Hilliard Hotel Co. to enjoin the Vanderbilt Hotel from performing John Philip Sousa's song, "From Maine to Oregon," in a hotel dining room. John Church Co. v. Hilliard Hotel Co., 221 F. 229 (2d Cir. 1915). The District Court granted the preliminary injunction. *Id.* On appeal, the Circuit Court stated that "Congress seems to have meant by the words 'for profit' a direct pecuniary charge for the performance, such as an admission fee or a fee deposited in a coin-operated machine, although the latter is excepted by the act." *Id.* at

did not collect admission fees, its use of "Sweethearts" was not for profit.[75] On appeal, the Second Circuit affirmed the District Court's ruling.[76] To ensure the longevity of ASCAP's new business model, Herbert had no choice but to file a writ of certiorari to the Supreme Court.

On certiorari, the Court combined the *John Church Co*. and *Herbert* cases to determine what constituted "for-profit."[77] In a landmark decision for performing rights collections in the United States, Justice Oliver Wendell Holmes explained that performances:

> are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food . . . . Whether it pays or not, the purpose of employing [the music] is profit, and that is enough.[78]

ASCAP was in business; it had the legal authority necessary to require venues to purchase its blanket licenses. As the only organization bundling public performance licenses, ASCAP cornered the market over the ensuing twenty-five years.[79]

C. "Mo Money Mo Problems:"[80] Antitrust Concerns

Consumer radio created a new revenue stream for public performance rights licensing. While ASCAP initially licensed its catalog to individual radio stations by negotiating annual rates based on plays,[81] in 1932 ASCAP changed its strategy to require an additional percentage of radio stations' gross receipts from advertising sales, a move that angered many station owners.[82] However, lacking alternative licensing options, the stations begrudgingly agreed to the

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231. The court went on to say that "[i]t does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel." *Id.*

[75] Herbert v. Shanley Co., 222 F. 344 (S.D.N.Y. 1915).

[76] Herbert v. Shanley Co., 229, F. 340, 343 (2d Cir. 1916).

[77] *See generally* Herbert v. Shanley Co., 242 U.S. 591, 594–95 (1917).

[78] *Id.*

[79] SHAVERS, *supra* note 58, at 49.

[80] THE NOTORIOUS B.I.G. FEATURING MASE AND PUFF DADDY, *Mo Money Mo Problems*, LIFE AFTER DEATH (Bad Boy Records 1997).

[81] SHAVERS, *supra* note 58, at 69.

[82] E.C. Mills & Nevill Miller, *ASCAP-NAB Controversy: The Issues*, 11 AIR L. REV. 394, 399 (1940). ASCAP pitched this fee increase to broadcasters as a gradual change, where licenses would cost 3% for the first year and "then increas[e] one percentage point each [year] during the remainder of a three-year term." SHAVERS, *supra* note 58, at 69. To add insult to injury, this percentage applied to all the station's programming, not just the music affiliated to ASCAP, a clear overreach. *Id.*

terms.[83] This perceived abuse of leverage was not without recourse—the DOJ opened an antitrust investigation into ASCAP's practices.[84] To avoid litigation, ASCAP proposed an alternative five-year fixed fee, assuaging the DOJ's concerns enough to halt its investigations.[85] Still, radio stations were unimpressed.

In response, the National Association of Broadcasters (NAB) began lobbying to curtail ASCAP's bargaining power.[86] Near the end of ASCAP's five-year licensing contract, the NAB initiated efforts to renegotiate its rates with ASCAP, but records indicate that ASCAP avoided those negotiations almost altogether.[87] Frustrated by the futility of its attempts, the NAB sought alternative measures.[88] In 1939, the NAB created Broadcast Music, Inc. (BMI),[89] a PRO founded to provide more agreeable terms to radio broadcasters.[90]

Even with BMI alleviating some of the anti-competitive pressure, in March of 1940, ASCAP unilaterally introduced massive fee increases for stations and introduced a novel network rate of 7.5% of gross income, thus giving ASCAP a double-dip in earnings.[91] Radio stations already paid ASCAP directly, but now the networks to which those stations belonged also owed fees.[92] This proved to be an unwise strategy. By bringing the lobby of major networks into the fray, ASCAP all but sealed its fate.[93] For most of 1941, major networks boycotted ASCAP's catalog, a period cleverly titled the "ASCAP Boycott."[94]

In 1941, the DOJ sued both ASCAP and BMI for violations of the Sherman Antitrust Act, particularly regarding price fixing.[95] The DOJ argued that the unrestricted use of the blanket license constituted an illegal restraint of trade in a market lacking a reasonable degree of competition.[96] Both cases ended with implementation of consent decrees to curtail anticompetitive behavior.[97]

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[83] SHAVERS, *supra* note 58, at 70.

[84] *Id.*

[85] Mills & Miller, *supra* note 82, at 399.

[86] SHAVERS, *supra* note 58, at 71.

[87] *Id.* at 73.

[88] *Id.* at 74.

[89] *About*, BMI, http://www.bmi.com (last visited Feb. 12, 2016). To compete with the more established ASCAP, "BMI membership was open to lesser-known composers and publishers." SHAVERS, *supra* note 58, at 74. They offered more competitive blanket licenses and opened their doors to many minority recording groups, helping to spread cultural diversity through radio. *Id.*

[90] SHAVERS, *supra* note 58, at 73.

[91] *Id.*

[92] *Id.*

[93] *See* SHAVERS, *supra* note 58, at 76.

[94] *Id.* at 76.

[95] DOJ Statement, *supra* note 20, at 6.

[96] *See Antitrust Consent Decree Review, supra* note 23.

[97] *Id.*; *see also* Griffin Davis, *Conflict over Consent Decrees*, BERKLEE C. MUSIC: MUSIC BUS.

Under the consent decrees, both PROs agreed not to take exclusive rights.[98] Thus, copyright owners were, and continue to be, free to license directly to users while simultaneously using the services of their affiliated PRO.[99] Previously, both PROs "forbade their members from entering into direct licensing arrangements."[100] To protect consumers, both PROs are no longer allowed to refuse licenses to any licensee paying statutory rates.[101] In the case of a price disagreement between the licensee and ASCAP or BMI, PROs must issue a license while the parties litigate proper rates in the District Court for the Southern District of New York.[102] Additional PRO mandates include accepting any songwriter or publisher meeting minimum standards,[103] prohibiting the licensing of any rights besides public performance,[104] offering "alternative licenses to the blanket license,"[105] and limiting contractual terms to five years.[106] These rules are the topic of continual debate.

D. Antitrust Review

After ASCAP and BMI agreed to their respective consent decrees, *Broadcast Music, Inc. v. Columbia Broadcasting, Inc.* (CBS) marked the next seminal moment in PRO consent decree implementation.[107] The court grappled with

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J. (Oct. 2014), http://www.thembj.org/2014/10/the-conflict-over-consent-decrees/#sthash.GFCpxeDE.dpuf. While this statement does provide a good overview of past events, a more accurate recitation of the facts would state that BMI entered into its consent decree voluntarily and proactively in order to avoid the same costly antitrust litigation that ASCAP faced. *See* United States v. ASCAP, 1940–43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

[98] PASSMAN, *supra* note 13, at 246.

[99] *Id.* The consent decrees also exempted movie theaters. *Id.*

[100] MUSIC MARKETPLACE, *supra* note 13, at 35–36.

[101] *Id.*

[102] ASCAP Consent Decree § IX; BMI Consent Decree § XIV. The "rate courts" are two chambers in the U.S. District Court for the Southern District of New York. MUSIC MARKETPLACE, *supra* note 13, at 41. Today, those courts are overseen by Judge Denise Cote (assigned to ASCAP) and Judge Louis L. Stanton (assigned to BMI). *Id.* Any disagreements between licensees and PROs shall be settled within ninety (90) days for ASCAP and one-hundred and twenty (120) days for BMI. ASCAP Consent Decree § IX(F); BMI Consent Decree § XIV.B.

[103] ASCAP Consent Decree §§ IV.B-C, VI, VIII, XI; BMI Consent Decree §§ IV.A, V, VII (requiring a writer to have "at least one copyrighted musical composition of his writing commercially published or recorded, or with any publisher of music actively engaged in the music publishing business" among a few other minor details).

[104] ASCAP Consent Decree § IV.A.

[105] MUSIC MARKETPLACE, *supra* note 13, at 36 (including structures like offering flat fees with carve outs for music directly licensed).

[106] ASCAP Consent Decree § IV.D; BMI Consent Decree §§ V.B.

[107] 441 U.S. 1 (1979). For trivia: "CBS was a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959." *Id.* at n.4. Of course, there were separate amendments to the PROs prior to this point, but few, if any, reached the Supreme Court. *See generally* United States v. Am. Soc'y of Composers, Authors & Publishers, 1950–51 Tr. Cas. (CCH) ¶

whether the issuance "of blanket licenses to perform copyrighted musical compositions . . . [constituted] price fixing."[108] After careful consideration, the Supreme Court held that blanket licenses are not *per se* invalid[109] because "there are no practical impediments preventing direct dealing."[110] The Court added that "redeeming competitive virtues" are important to the analysis of anti-competitiveness.[111] "[T]he sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights."[112] The court was unequivocal: "A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided."[113]

E. Contemporary PRO Market Share

The United States has four prominent PROs—ASCAP, BMI, The Society of European Stage Authors and Composers (SESAC), and Global Music Rights (GMR).[114] ASCAP and BMI represent roughly 90% of the U.S. market.[115] ASCAP represents an estimated 600,000 songwriters, composers, and publishers,[116] while BMI represents roughly 750,000.[117] Today, streaming music accounts for their most significant source of revenue.[118] In 2015, ASCAP reported

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62,595 (S.D.N.Y. 1950).

[108] *See Broad. Music, Inc*, 441 U.S. 1. CBS also brought unlawful tying charges. *Id.* at 8.

[109] "Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal." *Id.* at 23. Justice Stevens, in his dissent, believed that it was ASCAP's refusal to offer anything less than the entire catalog that violated the Antitrust Act. *Id.* at 28. He argued that while a blanket license is not on its face unlawful, when "[v]irtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI . . . , the only means that has been used to secure authority to perform such compositions is the blanket license." *Id.* at 30. Because this price is not related to the quantity or quality of music the licensee obtains, this blanket licensing scheme is discriminatory. *Id.*

[110] *Id.* at 12.

[111] *Id.* at 13. The court even referenced the DOJ's amicus brief in support of a Ninth Circuit finding, which stated "there must be 'some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them.'" *Id.* at 14 (quoting memorandum for United States as Amicus Curiae on Pet. For Cert. in K-91, Inc. v. Gershwin Publishing Corp., O.T. 1967, No. 147, pp. 10–11).

[112] *Id.* at 14–15 (quoting Amicus Curiae O.T. 1967, No. 147 at 10).

[113] *Id.* at 20.

[114] PASSMAN, *supra* note 13, at 245–46.

[115] MUSIC MARKETPLACE, *supra* note 13, at 20.

[116] *Why ASCAP?*, ASCAP, http://www.ascap.com/ (last visited Feb. 24, 2016).

[117] *About*, BMI, http://www.bmi.com/about (last visited Feb. 24, 2016).

[118] *Annual Report 2015*, ASCAP 17, https://www.ascap.com/-/media/files/pdf/about/annual-reports/2015-annual-report.pdf (last visited Feb. 24, 2016). New media accounts for roughly $41

$1.014 billion in revenue,[119] and claimed 12.3% overhead.[120] That same year, BMI posted revenues of $1.013 billion, with an overhead of 13.4%.[121]

SESAC[122] and GMR control the rest of the PRO market.[123] SESAC recently acquired Harry Fox Agency[124] and was thereafter purchased by the private equity giant, The Blackstone Group L.P.[125] The newest player to join the ranks of major PROs is GMR, which offers a private, invitation-only service.[126]

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million in annual revenue, for ASCAP alone. *Id.*

[119] *Id.* at 25, 27. The company delivered $867.4 million in royalty distributions and tracked $570 billion individual digital musical performances. *Id.* at 13, 27.

[120] *Id.* The company maintains a membership of 540,000 and over 10 million works in its repertory. *Id.* at 12. ASCAP pools and distributes collected fees according to the "results of census . . . or sample surveys of performances in each of the areas licensed." BRABEC & BRABEC, *supra* note 13, at 323. The payments are calculated based on weighting formulas, writer's distribution formulas, publisher's distribution formulas, and ASCAP's Weighting Rules, all of which are publicly available. *Id.*

[121] *BMI 2015 Annual Review*, BMI 2, http://www.bmi.com/pdfs/publications/2015/BMI_Annual_Review_2015.pdf (last visited Feb. 24, 2016); *see also* Tim Ingham, *BMI Revenues Top $1BN—But Payouts to Members Lag Behind ASCAP*, MUSIC BUS. WORLDWIDE (September 11, 2015), http://www.musicbusinessworldwide.com/bmi-revenues-top-1bn-but-payouts-to-members-lag-behind-ascap/. The company distributed $877 million in royalties to its members through the exploitation of its roughly 10.5 million works. *BMI 2015 Annual Review* at 2. The company earned over $100 million from digital sources alone. *Id.* BMI processed over 600 billion copyright transactions, 500 billion of which were digital performances. *Id.* The company distributes royalties in two separate sums: (1) it distributes the amounts due to its members under predetermined rate schedules; and (2) it also distributes additional bonuses, or "voluntary payments," estimated between 30% and 40% of BMI distributions. *Id.* at 12. BMI bases its radio payments on license fees of stations that play the work, Hit Song Bonuses, and standard bonuses for high spin U.S. radio plays. BRABEC & BRABEC, *supra* note 13, at 325. One major difference between ASCAP and BMI is that BMI does not release it payment formulas, likely because its consent decree does not explicitly require disclosure like ASCAP's does. *Id.*

[122] SESAC was incorporated in 1931 concentrating on classical and gospel music. BRABEC & BRABEC, *supra* note 13, at 325. "SESAC currently licenses the public performances of more than 400,000 songs on behalf of its 30,000 affiliated songwriters, composers and music publishers . . . ." *About SESAC*, SESAC, http://www.sesac.com/About/About.aspx (last visited Nov. 13, 2015).

[123] BRABEC & BRABEC, *supra* note 13, at 339; *see also* PASSMAN, *supra* note 13, at 235–36. SESAC's market share is roughly 5%. Chris Versace, *The Future of Streaming Music Rests with Congress*, FOX BUSINESS (June 23, 2014), http://www.foxbusiness.com/features/2014/06/23/future-streaming-music-rests-with-congress.html. SESAC "controls approximately 5% of the market." *Id.*

[124] Ed Christman, *SESAC Finalizes Acquisition of Harry Fox Agency*, BILLBOARD (Sept. 9, 2015), http://www.billboard.com/articles/business/6693385/sesac-finalizes-acquisition-of-harry-fox-agency.

[125] Marc Schnieder, *Blackstone to Acquire Music Rights Organization SESAC*, BILLBOARD (Jan. 4, 2017), http://www.billboard.com/articles/business/7646930/sesac-blackstone-acquisition-details.

[126] GMR is a part of Azoff MSG Entertainment. GLOBAL MUSIC RIGHTS, http://globalmusicrights.com/ (last visited Feb. 25, 2016). The promise by GMR is that it may be able to get as much as 30% higher royalties from radio stations and digital service providers by negotiating directly with companies, instead of the compulsory licenses determined by the Rate court for BMI and ASCAP. Ben Sisario, *New Venture Seeks Higher Royalties for Songwriters,* N.Y. TIMES, (Oct. 29, 2014) http://www.nytimes.com/2014/10/30/business/media/new-venture-seeks-higher-royalties-for-

SESAC and GMR are not bound by consent decrees, and are therefore largely unregulated, for-profit businesses.[127]

III. PARTIAL WITHDRAW

In 2011, ASCAP gave its affiliated member publishers the right to directly negotiate their new media rights[128] after a series of unfavorable rate court judgments left publishers troubled.[129] BMI followed suit in 2013.[130] Because of the low licensing rates awarded to digital music service providers in rate court proceedings, major publishers like EMI Music Publishing (before its acquisition by Sony/ATV), Sony/ATV, and UMPG partially withdrew their new media rights.[131] Thereafter, they directly negotiated new media licensing rates with digital service providers.[132] This tactic proved instantly successful, with pub-

songwriters.html?_r=0. "Grimmett [head of GMR] said part of his company's advantage was its newcomer status, allowing for GMR to jump into the 21st century, without going through the decades-long maturation—and heavy paper trail—of ASCAP and BMI. 'We had an advantage, starting with modern technology.'" Andrew Flanagan, *Global Music Rights, ASCAP, BMI and Pandora Get Nitty and Gritty in CMJ Discussion,* BILLBOARD (Oct. 19, 2015, 1:05 PM), http://www.billboard.com/biz/articles/6731056/global-music-rights-ascap-bmi-and-pandora-get-nitty-and-gritty-in-cmj.

[127] PASSMAN, *supra* note 13, at 249. Furthermore, they are more discerning in their acceptance of members, whereas ASCAP and BMI may not exclude members meeting the minimum standards set by the consent decrees. *Id.*; United States v. ASCAP, No. 41-1395, 2001 WL 1589999, 2001–02 Trade Cas. (CCH) ¶ 73,474, § XI (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); United States v. BMI, No. 64-civ-3787, 1966 U.S. Dist. LEXIS 10449*,* 1966 Trade Cas. (CCH) ¶ 71,941, § V (S.D.N.Y. 1966), *as amended by*, 1994 U.S. Dist. LEXIS 2 1476, 1996-1 Trade Cas.

[128] "[I]n April 2011, the ASCAP Board adopted a resolution to amend the Compendium ['Compendium Modification'] to allow members to withdraw from ASCAP its rights to license their music to New Media outlets, while allowing ASCAP to retain the right to license those works to other outlets." In re Pandora Media, Inc., No. 12 CIV. 8035 DLC, 2013 WL 5211927, at *2 (S.D.N.Y. Sept. 17, 2013), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

[129] Publishers "like Sony/ATV and Universal Music Publishing Group [wanted to] negotiate direct licenses with digital services while still enjoying the benefit of the PRO's blanket licenses for all other types of licensees." Ed Christman, *Dept. of Justice Mandate: Despite Outcry from Publishers, Digital Music Services Don't See What the Big Deal Is*, BILLBOARD (Aug. 3, 2016), http://www.billboard.com/articles/news/7461023/dept-of-justice-mandate-publishers-digital-music-services [hereinafter *Outcry*].

[130] In re Pandora Media, Inc., Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927, at *2 (S.D.N.Y. Sept. 17, 2013); BMI v. Pandora Media, Inc*.,* Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788, at *2–3 (S.D.N.Y. Dec. 19, 2013).

[131] PASSMAN, *supra* note 13, at 247; *see also* Ed Christman, *Dept. of Justice Sends Doc Requests, Investigating UMPG, Sony/ATV, BMI and ASCAP over Possible 'Coordination*,' BILLBOARD (July 13, 2014, 11:51 AM), http://www.billboard.com/biz/articles/news/publishing/6157513/dept-of-justice-sends-doc-requests-investigating-umpg-sonyatv.

[132] PASSMAN, *supra* note 13, at 247; *see also* Ed Christman, *Dept. of Justice Sends Doc Requests, Investigating UMPG, Sony/ATV, BMI and ASCAP over Possible 'Coordination*,' BILLBOARD (July 13, 2014, 11:51 AM), http://www.billboard.com/biz/articles/news/publishing/6157513/dept-of-justice-sends-doc-requests-investigating-umpg-sonyatv; Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers*,* 785 F.3d 73, 76 (2d Cir. 2015). Despite taking over negotiations, the

lishers receiving "higher fees [from Pandora[133]] than those they were receiving under the PRO system."[134] In individual negotiations, Sony/ATV managed to negotiate a rate of 2.28% of Pandora's revenue and UMPG negotiated a rate of 3.42%,[135] both greater than the 1.85% rate negotiated by ASCAP.[136] Unsurprisingly, Pandora filed suit to invalidate the partial withdrawals that led to such drastic rate hikes.[137] In September 2013, Judge Cote granted Pandora's motion for summary judgment.[138] She agreed with Pandora: "ASCAP repertory is a defined term[] articulated in terms of works or compositions, as opposed to in terms of a gerrymandered parcel of rights."[139] Shortly thereafter, Judge Louis Stanton echoed those sentiments, ruling that music publishers could not withdraw selected "partial" rights from BMI.[140] The court explained that BMI's Consent Decree explicitly regulated conduct:

> The BMI Consent Decree requires that all compositions in the BMI repertory be offered to all applicants. Under Section XIV of the BMI Consent Decree, when an applicant requests a license for any, some or all of the compositions in defendant's repertory, BMI must grant a license for performance of the requested compositions to all applicants, with fees that do not discriminate between applicants similarly situated.[141]

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publishers continued to use ASCAP and BMI to administer the collection of those digital rights. *Id.*

[133] Pandora is considered a non-interactive service and therefore obtains blanket licenses through BMI and ASCAP at low rates like those of radio. *The Performance Right Juncture*, *supra* note 13.

[134] MUSIC MARKETPLACE, *supra* note 13, at 39.

[135] *Pandora Ratesetting*, 6 F. Supp. 3d at 330, 339–40, 355.

[136] Ed Christman, *Why Publishers Lost Big Against Pandora (Analysis)*, BILLBOARD (Mar. 20, 2014, 2:50 PM), http://www.billboard.com/biz/articles/news/publishing/5944618/why-publishers-lost-big-against-pandora-analysis.

[137] *In re Pandora*, 2013 WL 5211927; BMI v. Pandora, 2013 WL 6697788; *see also* PASSMAN, *supra* note 13, at 247.

[138] *See* In re Pandora Media, Inc., No. 12 Civ. 8035 (DLC), 2013 WL 5211927, at **5–7 (S.D.N.Y. Sept. 17, 2013), *aff'd, sub nom.* Pandora Media, Inc. v. ASCAP, 785 F.3d 73, 77 (2d Cir. 2015) (per curiam). "Section VI of AFJ2 ('Section VI') reads, in relevant part, as follows: 'Licensing. ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory.'" *Id.* "Section IX(E) of AFJ2 ('Section IX(E)') provides in relevant part that '[p]ending the completion of any [rate] negotiations or proceedings, the music user shall have the right to perform any, some or all of the works in the ASCAP repertory to which its application pertains . . . .' And AFJ2 § II(C) ('Section II(C)') defines 'ASCAP repertory' as 'those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time.'" *Id.*

[139] *In re Pandora*, 2013 WL 5211927, at *5 (internal citations omitted).

[140] Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037 (LLS), 2013 WL 6697788, at **3–4 (S.D.N.Y. Dec. 19, 2013); *see also* Ed Christman, *Pandora Wins In ASCAP's Appeal of Payment Rate*, BILLBOARD (May 6, 2015, 2:33 PM), http://www.billboard.com/articles/business/6554086/pandora-wins-in-ascaps-appeal-of-payment-rate [hereinafter *Pandora Wins*].

[141] *BMI*, 2013 WL 6697788 at *3 (internal quotations omitted).

The court holdings mandated either complete withdrawal by publishers from their PROs or complete abidance to PRO negotiations.[142] Fearing the loss of their traditional sources of public performance revenue, most major publishers conceded and continued to use their affiliated PROs.

Once the dust settled, the ASCAP rate court[143] set a flat rate of 1.85%, drastically lower than the 3% rate requested by publishers and PROs.[144] The court's opinion cited "improper negotiation tactics" by the publishing companies as a driving factor for denying the 3% request.[145] On the inevitable appeal, regarding both the resultant rate and right to partial withdrawal, the Second Circuit—with Judges Leval, Straub, and Droney presiding—affirmed the rate of 1.85% of revenue for five years and affirmed the 100% licensing mandate.[146] The court "agree[d] with the district court's determination that the plain language of the consent decree unambiguously precludes ASCAP from accepting such partial withdrawals."[147]

Separately, Judge Stanton ordered Pandora to pay BMI 2.5% of its revenues.[148] Pandora appealed, citing the Second Circuit's 1.85% rate with ASCAP,[149] but later withdrew the appeal after negotiating a separate multi-year licensing agreement with BMI.[150]

Because of their perceived losses, publishers, with the help of ASCAP and BMI, petitioned the DOJ to review their consent decrees.[151] Mike O'Neil, BMI' President and CEO, championed publishers' rights "to license works for certain uses, while . . . retain[ing] the exclusive right[s] to license works for other defined, digital uses,"[152] to allow for willing-user willing-seller negotiations.[153] An

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[142] *The Performance Right Juncture*, *supra* note 13.

[143] "ASCAP had requested a rate of 1.85 percent for 2011 and 2012, 2.5 percent for 2013, and 3 percent for 2014 and 2015. [Pandora countered with] a rate between the current 1.7 per cent [sic] traditional radio rate . . . and 1.85 percent (the ASCAP form rate in effect for Pandora since 2005)." *The Performance Right Juncture*, *supra* note 13.

[144] *Id.*

[145] *Id.* "Sony decided quite deliberately to withhold from Pandora the information Pandora needed to strengthen its hand in its negotiations with Sony." *In re Pandora*, Slip Op. at 42–43.

[146] *In re Pandora*, Slip Op. at 247–48.

[147] Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers, 785 F.3d 73, 77 (2d Cir. 2015).

[148] Broad. Music, Inc. v. Pandora Media, Inc., 140 F. Supp. 3d 267, 294 (S.D.N.Y. 2015), appeal withdrawn (Jan. 6, 2016). This rate was up 42% from its previous rate of 1.75%. Ed Christman, *BMI Wins in Rate Court Battle with Pandora,* BILLBOARD (May 14, 2015, 8:30 PM), http://www.billboard.com/articles/business/6568286/bmi-wins-court-battle-pandora.

[149] *Pandora Wins*, *supra* note 140.

[150] Eric T. Parker, *Pandora Drops Rate Court Appeal, Signs with ASCAP, BMI*, MUSIC ROW (Dec. 22, 2015), https://www.musicrow.com/2015/12/pandora-drops-rate-court-appeal-signs-with-ascap-bmi/.

[151] *Id.* (increasing to roughly $1.6 billion).

[152] *Change is Now: What is the Consent Decree*, BMI, http://www.bmi.com/pdfs/advocacy/abo

analysis regarding the merits of such a proposal may best be defined through the lenses of economics and the law.

A. Economics

Sony/ATV, UMPG, Warner/Chappell, Kobalt,[154] and a growing songwriter coalition are among the proponents of partial withdrawal, hoping to reap the rewards of greater negotiating power. New media services like Amazon, Apple, Microsoft, Pandora, Rhapsody, and YouTube, as well as repeat consumer licensees like those represented by the RMLC, oppose the practice and are generally content with current licensing rates.[155]

Publishers argue that PRO antitrust restrictions and their subsequent legal interpretations have exceeded the Sherman Act's defined purpose.[156] Songwriter public performance royalties are severely depressed in comparison to their sound recording royalties counterpart.[157] From a songwriter's perspective, the necessity for economies of scale in the physical realm does not exist in the digital space.[158] Royalty collections from digital music service providers in the

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ut_bmi_consent_decree.pdf (last visited Feb. 2, 2017).

[153] *See Public Comments of Broadcast Music, Inc. U.S. Department of Justice, Antitrust Division Review of Consent Decree in United States v. Broadcast Music, Inc.*, BMI, Aug. 6, 2014. http://www.bmi.com/pdfs/advocacy/bmi_public_comments_to_doj.pdf; Antitrust Div., U.S. Dep't of Justice, Antitrust Division Opens Review of ASCAP and BMI Consent Decrees, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Aug. 6, 2014).

[154] Tim Ingham, *Martin Bandier Slams 'Inexplicable' US Consent Decree Ruling,* MUSIC BUS. WORLDWIDE (June 30, 2016), http://www.musicbusinessworldwide.com/martin-bandier-slams-inexplicable-us-consent-decree-ruling/ [hereinafter *Martin Bandier Slams Ruling*]; *see also* Universal Music Publishing Group, Comment Regarding ASCAP and BMI Consent Decree Review, https://www.justice.gov/sites/default/files/atr/legacy/2014/09/24/307988.pdf (last visited Mar. 1, 2017).

[155] Media Licensees, Comments of Media Licensees (Nov. 20, 2015), http://www.justice.gov/atr/public/ascapbmi2015/ascapbmi19.pdf (also including the NAB, Sirius XM Radio, Inc., Netflix, Inc., Viacom, Rhapsody International Inc., National Cable & Telecommunications Association, TLMC, the National Religious Broadcasters Music License Committee, etc.).

[156] *See* National Music Publishers' Association, Comments by the National Music Publishers' Association Submitted in Response to US Justice Department Antitrust Division Solicitation of Public Comments Regarding Review of the ASCAP and BMI Consent Decrees, https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307900.pdf (last visited Jan. 16, 2017). "Although the consent decrees were imposed to protect against anticompetitive behavior, they are now used to distort and manipulate the market for the benefit of a handful of powerful distribution companies. . . ." *Id.* at 5.

[157] *See infra* Part V.

[158] Sony/ATV Music Publishing LLC, Comments Submitted to the Department of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees 9 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/09/24/307983.pdf [hereinafter Sony/ATV Publishing]. "Unlike the geographically far-flung small businesses that have historically characterized the market for licensing public performance rights (and which precipitated the rise of the PROs to begin with), many media services today do not present the same insurmountable transaction, monitoring, and

agregate are far less cost prohibitive than from venues.[159] To compound the economic restrictions already depressing rates, rate court proceedings lack the empirical predictability of the free market.[160] Resultantly, income is not efficiently invested, a fact particularly detrimental to talent development.[161] These overreaches are all buttressed by claims that licensees have employed "tactical litigation" to avoid payments while litigation pends.[162]

Many songwriters also argue that by artificially depressing the market value of their streaming music, the judiciary is effectively subsidizing tech companies that merely provide distribution.[163] However, such active depression may be purposeful. "By ensuring licensees have access to reasonable, non-discriminatory licenses, the consent decrees allow new digital music platforms to launch and legally perform songs without becoming beholden to ASCAP and BMI,"[164] resulting in savings that may be passed on to consumers.[165]

Some fear that granting publishers the opportunity to choose which rights to negotiate "might engender harsh backlash from international societies and other nations."[166] This "harsh backlash" is likely exaggeration. Canadian

enforcement costs that have historically characterized the market for performing rights licenses. To the contrary, today's technology-driven music services operate nationally or even internationally from a single location while servicing hundreds of thousands or even millions of consumers." *Id.*

[159] *See Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print (last updated Dec. 15, 2016)."

[160] *See* Sony/ATV Publishing, *supra* note 158, at 8.

[161] *Id.* Stated differently, "diversification of revenue streams . . . allow[s] Peermusic to mitigate the ups and downs of music income for its songwriters, and to devote resources to authors and composers with a long view toward individual creative development and the advancement of the craft of songwriting." Peermusic, Comments by Peermusic Submitted in Response to US Justice Department Antitrust Division Request for Comments on Review of ASCAP And BMI Consent Decrees 2, https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307812.pdf (last visited Feb 2, 2017).

[162] Peermusic, *supra* note 161, at 3.

[163] "Songwriters and composers who actually create music should not be forced to subsidize companies that do little more, if anything, than distribute or broadcast such music." Universal Music Publishing Group, *supra* note 154, at 3.

[164] Public Knowledge, Comments of Public Knowledge 5 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307976.pdf.

[165] *Id.* at 10. It could also "make it easier for musicians to bring their works to market without necessarily relying on a publisher or record label to handle marketing, promotion, and distribution." *Id.* at 11.

[166] Songwriters Guild of America, Response of the Songwriters Guild of America, Inc. to the Solicitation of Public Comments by the United States Department of Justice Regarding the Question of the Continued Efficacy of the Consent Decrees to Which the Performing Rights Societies Known as American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") Remain Subject 19 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/09/12/307845.pdf. "'The DOJ's decision reaches far beyond our shores and threatens our relationships with foreign writers, publishers and record companies.'" Chris Cooke, *Indie Publishers Add to Angry Criticism of US Government's 100% Licensing Plan*, COMPLETE MUSIC UPDATE (July 13, 2016), http://www.completemusicupdate.com/article/indie-publishers-add-to-angry-criticism-of-

SOCAN,[167] Italian SIAE,[168] and English PRS[169] each advocated *for* partial withdrawal in their comments to the DOJ. Japan's JASRAC not only supported partial withdrawal, but already allows its members to selectively withdraw rights.[170] In fact, no foreign PRO submitted comments opposing partial withdrawal.[171] Thus, it seems arguments regarding international resentment are without merit.

Separately, the effect a prohibition on partial withdrawal would have on smaller publishers and songwriters is difficult to divine. Some fear that without partial withdrawal, major publishers might remove their entire catalogs from ASCAP and BMI.[172] Such an action would effectively cripple those PROs' efficacy, raising overhead as a percentage of revenue, and burdening thousands of small or burgeoning songwriters.[173] "The collateral effects could be drastic: independent publishers would be left to bear the full burden of the PROs' administrative costs."[174] However, SESAC and GMR would likely stand to gain the most, as ASCAP and BMI members look for new affiliation.

B. Law

While parties on both sides of the aisle may reasonably argue economic theory in favor of consumers or songwriters, legal arguments provide less room for speculation. Proponents of partial withdrawal often begin by referencing copyright law.[175] "Copyright owners should be free to choose to individually negotiate deals with particular music users, rather than be[] compelled to participate in . . . blanket licenses for all purposes."[176] In fact, copyright law explicitly

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[167] *See generally* Letter from Gilles Daigle to Litig. III Chief, Antitrust Div., U.S. DOJ (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307844.pdf.

[168] *See generally* Letter from Simona Porzia, Dir. of Int'l Dept., to Litig. III Chief, Antitrust Div., U.S. DOJ (Aug. 5, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307727.pdf.

[169] *See generally* PRS for Music, Antitrust Division Review of American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") Consent Decrees ("Review") (Aug. 5, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307652.pdf.

[170] *See generally* JASRAC, Comments of the Japanese Society for Rights of Authors, Composers and Publishers (Aug. 5, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307760.pdf.

[171] U.S. Dep't of Justice, ASCAP and BMI Consent Decree Review Public Comments 2014, https://www.justice.gov/atr/public-comments.

[172] PASSMAN, *supra* note 13, at 248.

[173] *See id.*

[174] Peermusic, *supra* note 161, at 4.

[175] *See e.g.* Universal Music Publishing Group, *supra* 141, at 2.

[176] *Id.* "The European Union recently adopted this approach, stating that rights holders should have the flexibility to 'withdraw from a collective management society any of the rights, categories of rights or types of works and other subject-matter of their choice' on reasonable notice." *Id.* (cit-

provides copyright holders with the right to license works "in whole or in part."[177]

Conversely, opponents' main legal argument centers around concerns about the music industry's history of anticompetitive behavior[178]—concerns that are only amplified by the actions of other PROs.[179] "[P]ublishers and PROs [seem] well aware that they could potentially coordinate their negotiations to benefit each other at the expense of consumers, music delivery services, and independent publishers and songwriters."[180] However, PROs infrequently compete directly because licensees often require licenses from every PRO, regardless of rate.[181] More serious concerns derive from the prospect of granting the already heavily consolidated publishing industry the right to negotiate with streaming services.[182] The Sherman Antitrust Act, in relevant part, states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[183] Courts interpret these restraints under the "rule of reason."[184] Significantly, price fixing is deemed illegal, *per se*.[185]

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ing European Parliament and Council, Directive 2014/26/EU of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, 2014 O.J. (L 84) Art. 5, § 4.).

[177] 17 U.S.C. § 201(d) (2012).

[178] *See* United States v. Broad. Music, Inc., 275 F.3d 168, 172 (2d Cir. 2001) (showing further amendments in 1994); United States v. Broad. Music, Inc., Civ. No. 459, [1940–1943] Trade Cas. (CCH) 56,096 (E.D. Wis. May 14, 1941) (explaining initial reasons for the implementation of consent decrees); United States v. ASCAP, Civ. No. 13-95, [1940–1943] Trade Cas. (CCH) 56,104 (S.D.N.Y. Mar. 4, 1941); Notice of Joint Motion to Enter Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. filed Sept. 1, 2000); Complaint, United States v. Broad. Music, Inc., Civ. No. 64 Civ. 3787 (S.D.N.Y. filed Dec. 10, 1964) (requiring amendments for further antitrust behavior); Sony/ATV Publishing, *supra* note 158, at 5. In fact, ASCAP settled antitrust litigation brought by the DOJ for $1.75 million as recently as May 12, 2016. United States' Notice of Motion and Unopposed Motion for Entry of Proposed Settlement Agreement and Order, United States v. American Society of Composers, Authors, and Publishers, Case 1:41-cv-01395-DLC-MHD Supplemental to Case No. 41-1395 (DLC) (May 12, 2016), https://www.justice.gov/atr/file/851436/download.

[179] Radio Music License Committee, Inc. and the Television Music License Committee, LLC, Comments of the Radio Music License Committee, Inc. and the Television Music License Committee, LLC 2 (July 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307977.pdf (discussing radio and television licensees' experiences, while anecdotal, of contentious SESAC negotiations).

[180] Public Knowledge, *supra* note 164, at 8 (citing *In re* Petition of Pandora Media, Inc., Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927 (S.D.N.Y 2014)).

[181] Pandora Media, Inc., Comments of Pandora Media, Inc. In Response to the Department of Justice's Review of the ASCAP and BMI Consent Decrees 6, https://www.justice.gov/sites/default/files/atr/legacy/2014/08/27/307973.pdf.

[182] Public Knowledge, *supra* note 164, at 15.

[183] 15 U.S.C. § 1 (2012).

[184] Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342–43 (1982).

[185] *Id.* at 344–45.

"[T]he manipulation that permeates this particular market necessitates some protections. The consent decrees allow ASCAP and BMI to maintain their monopolies, but protect consumers from their monopoly power."[186] Granting publishers unrestricted negotiating power could be dangerous for consumers. However, publishers already engage in direct bilateral market negotiations for other rights like synchronization licenses, so why should public performance negotiations result in antitrust violations?[187]

IV. FRACTIONAL LICENSING

While the DOJ initiated its 2014 review primarily to address partial withdrawal, by 2015 attention had shifted to fractional licensing—a discrete practice with a strikingly similar name.[188] For further analysis, the DOJ requested and received additional public comments regarding whether PROs should be required to issue 100% licenses.[189] A 100% licensing requirement would compel ASCAP and BMI to license entire songs of which their members only held partial ownership.[190] With extensive stakeholder commentary submitted, the DOJ issued its recommendations.

Unpredictably, at the end of its two-year review, "[t]he DOJ denied virtually all requests from music publishers and songwriters, and . . . ruled that each PRO c[ould] license 100% of a song for use, regardless of what percentage of the song a PRO represents."[191] While copyright law grants songwriters the right to "license 100 percent of a song, traditionally the U.S. music publishing industry . . . operated with each rightsholder licensing only their share of a song."[192]

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[186] Christopher Versace, *The Department of Justice Got it Right*, FORBES (June 30, 2016, 4:42 PM), http://www.forbes.com/sites/chrisversace/2016/06/30/the-department-of-justice-got-it-right/#78b0a6771a21; *see also* Jeff John Roberts, *The Music Industry Just Lost a Big Fight with the Government Over Royalties*, FORTUNE (updated June 30, 2016, 12:41 PM), http://fortune.com/2016/06/30/ascap-consent-decrees/. "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." ASCAP v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012); United States v. ASCAP, 627 F.3d 64, 76 (2d Cir. 2010).

[187] National Music Publishers' Association, Comments by the National Music Publishers' Association Submitted in Response to US Justice Department Antitrust Division Solicitation of Public Comments Regarding Review of the ASCAP and BMI Consent Decrees 9, https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307900.pdf (last visited Jan. 15, 2017).

[188] *See supra* Part III.

[189] Ed Christman, *100 Percent Licensing: U.S. Copyright Office Argues New Proposal Threatens Song Owner's Rights*, BILLBOARD, (Feb. 26, 2016), http://www.billboard.com/articles/business/6890403/100-percent-licensing-us-copyright-office-threatens-song-owners-ascap-bmi-dept-of-justice.

[190] *Id.*

[191] Hodak, *supra* note 2.

[192] Ed Christman, *Department of Justice to Deny Consent Decree Amendment*, BILLBOARD (June 30, 2016), http://www.billboard.com/articles/news/7423321/department-of-justice-deny-consent-decree-amendment [hereinafter *DOJ to Deny Amendment*].

The industry norm was for licensees to seek licenses "from each of a song's rightsholders because of information gaps caused by the lack of a standardized database; licensing from all rightsholders protect[ed] users from unintentional infringement."[193] While the DOJ's recommendations broke with industry practice,[194] the Rate Courts still had the authority to accept or decline the DOJ's recommendations.[195]

BMI promptly challenged the DOJ's decision through a motion for declaratory judgment, fearing the value-depressing effects of rate-shopping for the PRO offering the lowest price.[196] Judge Stanton held that "[n]othing in the consent decrees neither bars fractional licensing, nor requires full-work licensing,"[197] essentially overriding the DOJ's recommendation. Despite Judge Stanton's decision, ASCAP and its affiliates *remain* governed by the DOJ's decision,[198] sparking questions about what ASCAP's next move might be. "Legal experts point out that in the past, Stanton and Cote have taken different paths regarding the consent decree, sometimes even being in complete opposition."[199] Likely, ASCAP will ignore the DOJ's decision for the year-long period given to implement the changes, "and at the end of that term, run the risk that the DOJ would take ASCAP to court."[200] In the interim, it seems that both PROs

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[193] *Id.*

[194] Fractional licensing was a longstanding industry practice that "went unquestioned as a background fact by . . . both licensors and licensees." United States Copyright Office, Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works 2 (2016), http://www.copyright.gov/policy/pro-licensing.pdf [hereinafter PRO Licensing] (showing that even companies like Spotify accepted these practices).

[195] Ben Sisario, *Justice Department Won't Alter Music Industry Royalty Rules*, N.Y. TIMES (June 30, 2016) http://www.nytimes.com/2016/07/01/business/media/justice-department-wont-alter-music-industry-royalty-rules.html; *see also* John Jeff Roberts, *supra* note 186.

[196] Karp, *supra* note 2; Legrand, *supra* note 31. "Songwriters of North America (SONA), a songwriter advocacy group, sued the Department of Justice over its interpretation of the antitrust consent decrees governing ASCAP and BMI, the two largest U.S. performance rights organizations (PROs)." Raza Panjwani, *Copyright Supremacy: SONA's Unsound Legal Theory*, PUBLIC KNOWLEDGE (Sept. 14, 2016), https://www.publicknowledge.org/news-blog/blogs/copyright-supremacy-sonas-unsound-legal-theory. It argues that "the agency overstepped its authority and that its ruling violated the property rights of songwriters by potentially nullifying private contracts between writers who have worked on the same song." Ben Sisario, *Songwriters Sue Justice Department over Licensing Rules*, N.Y. TIMES (Sept. 13, 2016), http://www.nytimes.com/2016/09/14/business/media/songwriters-sue-justice-department-over-licensing-rules.html?_r=0. "The songwriters' lawsuit argues that this change violates the Fifth Amendment by removing property rights without due process and seeks a declaration that the new rule is unlawful." *Id.*

[197] Legrand, *supra* note 31.

[198] Ed Christman, *Publishing Industry Praises BMI Consent-Decree Decision—But Outcome Remains Unclear*, BILLBOARD (Sept. 19, 2016), http://www.billboard.com/articles/news/7511350/publishing-industry-praises-bmi-consent-decree-decision-but-outcome-remains [hereinafter *Outcome Remains Unclear*].

[199] Legrand, *supra* note 31.

[200] *Outcome Remains Unclear*, *supra* note 198.

will be fighting the DOJ's recently filed appeal of Judge Stanton's declaratory judgment.[201]

A. Economics

Are "stakeholders . . . making a mountain out of a molehill?"[202] Fractional licensing advocates fear a "race-to-the-bottom" between BMI and ASCAP.[203] "100 percent licensing would . . . depress royalty rates by letting outlets like radio stations and digital music services shop for whatever party would accept the lowest fee."[204] Proponents of 100% licensing follow this thought experiment to a different end: "[W]hy would a PRO race to reduce rates—and reduce its commission? ASCAP and BMI control the vast majority of all songs in the U[nited] S[tates] and they have already condemned the decision—and, presumably, will continue to fight for higher royalty rates."[205] Despite the implication of collusion, such action would likely occur independently.

If 100% licensing becomes standard, some argue that a songwriter's right to terminate her PRO affiliation should disincentivize deleterious price setting.[206] Unfortunately, this reasoning fails to recognize that termination represents an illusory choice for many writers lacking the requisites to affiliate with SESAC and GMR, both of which deny unsolicited applications.[207] Additionally, "the presence of just one songwriter belonging to ASCAP or BMI could allow for the full blanket licensing of the work by a music user, even if other writers had withdrawn their rights."[208]

There is also a question of efficiency. Without 100% licensing, "'music users seeking to avoid infringement liability would face the daunting task of identifying and ensuring they obtained licenses from all fractional owners—a

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[201] Ed Christman, *Dept. of Justice Appeals BMI Consent Decree Decision*, BILLBOARD (Nov. 11, 2016), http://www.billboard.com/articles/business/7573537/doj-appeal-bmi-consent-decree-decision-fractional-licensing.

[202] *Outcry*, *supra* note 129.

[203] *DOJ to Deny Amendment*, *supra* note 192.

[204] Sisario, *supra* note 195. "This ultimately gives tech companies—from vulnerable startups to invulnerable giants—the power to shop around a track's multiple writers / rights-holders to try and get the cheapest deal." Tim Ingham, *Indie Publishers Up In Arms Over 'Unmitigated Disaster' of 100% Licensing*, MUSIC BUS. WORLDWIDE (July 12, 2016), http://www.musicbusinessworldwide.com/indie-publishers-up-in-arms-over-unmitigated-disaster-of-100-licensing/.

[205] Jody Dunitz, *Songwriters: The DOJ Got It Right. Your Sky Is Not Falling.*, DIGITAL MUSIC NEWS (July 14, 2016), http://www.digitalmusicnews.com/2016/07/14/songwriters-doj-got-right-100/.

[206] *Id.*; *see also* Pandora Media, Inc. v. ASCAP, 785 F.3d 73, 77–78 (2d Cir. 2015) (arguing that copyright law was not violated because licenses had the right to withdraw their rights).

[207] *Id.*

[208] Amber Healy, *Very Little Consent over Decree Ruling*, J. MUSICAL THINGS (Aug. 18, 2016), http://ajournalofmusicalthings.com/little-consent-decree-ruling/.

challenge made more difficult by the lack of a comprehensive, reliable and transparent catalog of rights.'"[209] Conversely, 100% licensing could wreak "havoc on [the] licensing and administration side, as each PRO currently lacks most information about writers outside their own organization."[210] "Given that ASCAP and BMI do not ordinarily make distributions to non-members, they do not collect or maintain the contact information for non-members that would be necessary to facilitate regular distributions to non-members."[211] Thus, it seems that the question is whether consumers or songwriters should bear the burden of administrative costs.

Joint work owners also fear a double deduction of overhead—once from the PRO issuing the license and again from the co-writer's PRO.[212] Such fees may have the capacity to render greater losses to writers than rate-shopping would. Regardless, even if PROs agree not to deduct overhead from income collected by other PROs, or simply charge *de minimis* fees, without a centralized database for all ownership rights, such accounting practices will be costly, if not prohibitive.[213]

One-hundred percent licensing may disincentivize collaboration between separately affiliated songwriters,[214] a result the Constitution's IP Clause explicitly aims to prevent.[215] SESAC and GMR members have even greater cause for concern because their profits per song license are comparably greater than those affiliated with ASCAP or BMI.[216] "[L]icensees of songs with multiple songwriters would likely rather cut deals with ASCAP and BMI—whose rates are hampered by the consent decree and rate court—than with the two PROs that

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[209] Renata Hesse, Remarks Regarding the Antitrust Division's Closing of its Review of the ASCAP and BMI Consent Decrees 5, https://www.justice.gov/opa/file/882116/download. Martin Bandier, explained that this "'decision . . . will adversely impact everyone in the licensing process, including PROs, licensees, music publishers and most of all songwriters who can ill afford to hire lawyers to figure out their rights under this inexplicable ruling." *Martin Bandier Slams Ruling*, *supra* note 154.

[210] Hodak, *supra* note 2.

[211] *PRO Licensing*, *supra* note 194, at 15–16.

[212] *DOJ to Deny Amendment*, *supra* note 192; Karp, *supra* note 3.

[213] *DOJ to Deny Amendment*, *supra* note 192.

[214] Sisario, *supra* note 195 (explaining that this "could also mean that musicians would be forced to change their writing habits based on the professional affiliations of their collaborators"); *see also DOJ to Deny Amendment*, *supra* note 192 (stating that "PROs and publishers wonder if the financial ramifications of this ruling will cut down on collaborations, with some writers choosing only to collaborate with writers within their own PRO").

[215] Charlotte Hassan, *AIMP, A2IM AND CMPA; This Position By The DoJ on 100% Licensing is 100% Wrong*, DIGITAL MUSIC NEWS (July 12, 2016), https://www.digitalmusicnews.com/2016/07/12/the-doj-on-100-licensing-is-100-wrong/. "The heart of the music business is the song. No recording artist would exist without a song, and songs would not exist without songwriters." *Id.*

[216] Such problems may be avoided through separate contract restrictions.

have the ability to seek market rates."[217] "On the other hand, it could drive some big publishers out of ASCAP and BMI, which would hurt those PROs' revenue base, and might lead them to SESAC and GMR for some service currently being provided by ASCAP and BMI."[218]

Finally, the nuclear option is the complete withdrawal by publishers from ASCAP and BMI.[219] "If they do so, Universal Music Publishing Group, Sony/ATV, Warner/Chappell and BMG could transform themselves overnight into PROs in their own right, . . . [putting the] existence of ASCAP and BMI in question."[220] In such cases, publishers might save on operating costs and earn more through greater negotiation flexibility. However, withdrawals are not without their own peril. Investment costs in physical collections administration may prove prohibitive. For songwriters, problems associated with publisher opacity arise; publishers do not have consent decrees mandating payment times, audits, or public access to rate information.[221]

In economic terms, it seems that while 100% licensing does create the opportunity to negatively impact songwriters, the effects of such impacts may be limited, absent drastic publisher reactions.

B. Law

Both ASCAP and BMI's CEOs condemned the DOJ's decision to require 100% licensing as breaking with "'long-standing industry practice.'"[222] While adapting to 100% licensing will likely be capital intensive, economic concerns should not be reviewed in a vacuum; the music business is uniquely intertwined with copyright, contract, and antitrust law.

1. Plain Language Interpretation

> ASCAP's decree requires it to "grant to any music user making a written request therefore a non-exclusive license to perform all of the works in the ASCAP repertory." More to the point, both ASCAP and BMI describe their licenses on their websites in terms akin to 100% licensing . . . . What the Department is doing, in effect, is reading the plain language of the consent decrees in combination

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[217] *DOJ to Deny Amendment*, *supra* note 192.

[218] *Id.*

[219] *Martin Bandier Slams Ruling*, *supra* note 154.

[220] Emmanuel Legrand, *Publishers and PROs Slam DOJ Licensing Ruling*, MUSIC WEEK (Jul. 1, 2016, 11:35 AM), http://www.musicweek.com/publishing/read/publishers-and-pros-slam-doj-licensing-ruling/065207 [hereinafter *Publishers and PROs Slam*].

[221] MUSIC MARKETPLACE, *supra* note 13, at 128.

[222] *Publishers and PROs Slam*, *supra* note 220. BMI's CEO, Michael O'Neill, wrote "'[w]e are surprised that the DoJ feels it needs to restructure a world that is efficient into one that we believe won't be.'" *Id.*

with taking the PROs at their word—not a particularly revolutionary act.[223]

The DOJ supported its decision to require 100% licensing, in part, through textual interpretation. A songwriter "joins ASCAP by executing a membership agreement . . . [which] grants to ASCAP the right to license any work that 'may be written, composed, acquired, owned, published, or copyrighted by the owner, alone, jointly or in collaboration with others.'"[224] Correspondingly, ASCAP's consent decree mandates that it provide users with "license[s] to perform all the works in the ASCAP repertory."[225] BMI's agreement similarly states that songwriters grant to BMI the right to license "all musical compositions . . . composed by [the member] alone or with one or more co-writers."[226] The DOJ posited that "the plain text of the decrees cannot be squared with an interpretation that allows fractional licensing: the consent decrees require ASCAP to offer users the ability to perform all 'works' in its repertory," with the same holding true for BMI.[227]

Reading the text differently, Judge Stanton[228] asserted that "[n]othing in the Consent Decree gives support to the Division's views. If a fractionally-licensed composition is disqualified from inclusion in BMI's repertory, it is not

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[223] Raza Panjwani, *A Closer Look at the Department of Justice's ASCAP and BMI Consent Decree Review*, PUBLIC KNOWLEDGE (July 18, 2016), https://www.publicknowledge.org/news-blog/blogs/a-closer-look-at-the-department-of-justices-ascap-and-bmi-consent-decree-re [hereinafter *A Closer Look*].

> According to ASCAP's licensing FAQ, '[o]ne of the greatest advantages of the ASCAP license is that it gives you the right to perform ANY or ALL of the millions of the musical works in our repertory . . . . And with one license fee, ASCAP saves you the time, expense, and burden of contacting thousands of copyright owners.' Similarly, '[BMI] Music Licenses offer copyright clearance to use all of the works in the BMI repertoire in a variety of ways. This service saves music users the immense time and expense of contacting each songwriter or composer for permission to play their music publicly.'

Id.

[224] DOJ Statement, *supra* note 20, at 6 (citation omitted).

[225] *Id.* at 7 (citing ASCAP Consent Decree § VI (emphasis added)). "In general terms, the 1941 Decree required that ASCAP's members give the Society only a non-exclusive agency to issue performance licenses . . . ." United States v. Am. Soc'y of Composers, 782 F. Supp. 778, 783 (S.D.N.Y. 1991).

[226] DOJ Statement, *supra* note 20, at 6 (internal quotations omitted). "BMI consent decree similarly requires BMI's licenses to provide music users with access to its 'repertory,' which includes 'those compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense.'" *Id.* at 7 (citing BMI Consent Decree § II(C)). "BMI grants you a non-exclusive license to publicly perform at the Licensed Premises all of the musical works of which BMI controls the rights to grant public performances during the terms." *Id.* at 12 (citing BMI Music License for Eating & Drinking Establishments, http://www.bmi.com/forms/licensing/gl/ede.pdf (last visited Feb. 3, 2017).

[227] *Id.* at 11.

[228] Broad. Music, Inc. v. Pandora Media, Inc., 2013 U.S. Dist. LEXIS 178414 (S.D.N.Y. Dec. 18, 2013)

for violation of any provision of the Consent Decree."[229] The validity and scope of the right to perform "are left to the congruent and competing interests in the music copyright market, and to copyright, property and other laws, to continue to resolve and enforce. Infringements (and fractional infringements) and remedies are not part of the Consent Decree's subject-matter."[230] Since reasonable minds disagree on the plain meaning of the consent decrees' text, further analysis must occur.

2. Legal Justifications

Upon first glance, it seems that 100% licensing conforms with Copyright Law.[231] According to the Copyright Act of 1976, co-owners of a joint work[232] "[are] treated generally as tenants in common . . . ."[233] Thus, a co-owner may grant a non-exclusive license on behalf of all owners, provided that the co-owners receive pro-rata shares of the licensing revenue.[234] "Congress created the rule to promote efficiency."[235] In theory, this also protects third parties from infringement liability by requiring only one license.[236] With this basis, it seems that "all [the] DOJ did was reaffirm the existing rules."[237]

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[229] United States v. Broad. Music, Inc., 2016 U.S. Dist. LEXIS 126588, at *4–5 (S.D.N.Y. Sep. 16, 2016).

[230] *Id.* at *6.

[231] *A Closer Look*, *supra* note 223. Of course, "[c]o-authors can agree among themselves to only grant permission to use their work when they all agree, something they often do when licensing other rights, like use of a song in an advertisement," but that is not at issue here. *Id.*

[232] A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C. § 101 (2012).

[233] H.R. REP. NO. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674 ("1976 House Report") 1976 House Report at 121; *see also* Songwriters Guild of America, supra note 152, at 17 (citing 17 U.S.C. § 201(a) (2012)); Sisario, *supra* note 195 (explaining that "Congress is clear in the Copyright Act that each individual co-writer is authorized to license the whole."); DOJ Statement, *supra* note 20, at 7 (citing PRO Licensing, *supra* note 194, at 6).

[234] PRO Licensing, *supra* note 194, at 6.

[235] Sisario, *supra* note 195 (citation omitted).

[236] PRO Licensing, *supra* note 194, at 9. "[I]f ownership of a copyrighted work is divided among multiple parties, with each agreeing to license only his or her own share, a third party may face infringement liability if it uses a work without obtaining permission from all of the owners." *Id.* "[O]nce a broadcaster has obtained a license from one of two joint copyright holders, he is immune from copyright liability to the other copyright holder." United States v. Am. Soc'y of Composers, Authors & Publrs., Civ. 13-95 (WCC), 1993 U.S. Dist. LEXIS 2566, 269-70 (S.D.N.Y. Feb. 26, 1993). However, copyright owners are "free to alter this statutory allocation of rights and liabilities by contract." GOLDSTEIN ON COPYRIGHT 4:7 (3d ed. Supp. 2011).

[237] Mike Montgomery, *Justice Department to the Rescue of Consumers and Music Competition*, HUFFINGTON POST (July 14, 2016, 10:32 AM), http://www.huffingtonpost.com/mike-montgomery/justice-department-to-the_b_10970142.html; *DOJ to Deny Amendment*, *supra* note 192; Healy, *supra* note 208.

However, this analysis ignores one major factor—PROs operate through agency and are merely intermediaries. Thus, while "co-owners of a song remain free to impose limitations on one another's ability to license [a] song,"[238] they may not restrict parties outside of the agreement.[239]

Resultantly, the Copyright Office weighed in on the subject favoring the current fractional licensing model.[240] One-hundred percent licensing "would effectively override copyright owners' choices to separately own and manage their copyright interests."[241] A co-owner cannot grant the PRO more than her share of the copyright.[242] One hundred percent licensing of derivative or compilation works further confuses the issue, possibly negating the copyright protection afforded to the underlying work's authors.[243] Absent a contract, PROs would not have the necessary privity with the underlying work's authors to license such a full song.[244] The Copyright Act grants authors the right to authorize others to exploit their work.[245] "To require a single PRO to grant a 100-percent license to

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[238] DOJ Statement, *supra* note 20, at 13 (citing BMI Music License for Eating & Drinking Establishments, http://www.bmi.com/forms/licensing/gl/ede.pdf).

[239] PRO Licensing, *supra* note 194, at 10.

[240] *Id.* In 2013, Congress, led by the House Judiciary Committee, began an extensive review of U.S. copyright laws to "illuminate critical concerns of the music marketplace." MUSIC MARKETPLACE, *supra* note 13, at 14. Its guiding principles were, "[m]usic creators should be fairly compensated for their contributions, [and] [t]he licensing process should be more efficient." *Id.* at 134. Maria A. Pallante, the previous Register of Copyrights, wrote that whole licensing "'would seemingly vitiate important principles of copyright law.'" Sisario, *supra* note 195. Texas Governor Gregg Abbott echoed such sentiments to Attorney General Loretta Lynch, writing that the DOJs decisions "is both legally flawed and threatens to harm the music industry in Texas." Marc Schneider, *Texas Governor Greg Abbot to Attorney General Loretta Lynch: Don't Mess with Song Licensing*, BILLBOARD (Aug. 31, 2016), http://www.billboard.com/articles/business/7494721/texas-governor-greg-abbott-to-attorney-general-loretta-lynch-dont-mess.

[241] PRO Licensing, *supra* note 194, at 19. "Congress made clear its intent that copyright interests could be divided and separately owned." *Id.* at 12 (citing 17 U.S.C. § 201(d)(2) (2012)). "The Copyright Office is aware of no authority by which the antitrust consent decrees governing ASCAP and BMI could operate to supplant Congress' constitutional prerogative to establish the nation's copyright law, or to override exclusive rights granted under that law or by foreign law." *Id.* at 21.

[242] *Id.* at 17–18. "[O]ne cannot validly convey rights to more than what one owns or controls." *Id.* at 17 (citing Davis v. Blige, 505 F.3d at 99). "100-percent licensing rule would operate as a *de facto* compulsory license by subjecting non-members of ASCAP or BMI to rates, terms, and distribution policies to which they never agreed." *Id.* at 20. "[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Id.* at 27.

[243] *Id.* at 19–20 (excluding contracts stating otherwise).

[244] *Id.* at 20. The copyright office also cautioned that foreign countries might require each individual owner to be a party to the license. *Id.* at 7. In "foreign jurisdictions, a license will not be valid unless all joint owners are party to it . . . [and thus], the licensee of a single joint owner will be unable to exploit his work [outside the United States]." *Id.* at 7 n.40 (citing 1 NIMMER ON COPYRIGHT § 6.10[D]). Nimmer explains that the United Kingdom, France, Italy, Japan, Mexico, and Canada all would not accept fractional licenses. *Id.*

[245] Minden Pictures, Inc. v. John Wiley & Sons, Inc., 795 F.3d 997, 1003 ("The right 'to authorize' . . . is also an 'exclusive right' under the Act.").

any work in its repertoire, irrespective of the underlying division of rights, would effectively eliminate the exclusive right of any non-member co-owner to authorize the public performance of his or her work."[246]

There is a possibility that offering a 100% license could expose the licensee to unexpected infringement actions.[247] Similarly, those separately affiliated might not know what they are owed,[248] since "ASCAP and BMI are not in contractual privity with non-members."[249] Nonmembers would lack the necessary privity to effectively sue for breach of contract, forcing nonmembers to sue under tort law or possibly sue their co-writer, a drastic disincentive to creativity.[250]

Conversely, copyright's grant of monopoly rights poses a particular threat to antitrust law. Proponents of the DOJ's decision are justifiably concerned with preventing anticompetitive behavior. Raza Panjwani, of Public Knowledge, cautioned against the recent and extensive consolidation of the music industry.[251] He is not wrong; three publishers account for a majority of the publishing business, and ASCAP and BMI combine for a 90% PRO market share.[252] Consent decrees "exist . . . to mitigate the anticompetitive threat posed by such large concentrations of negotiating power."[253] While antitrust regulations have a rational purpose, the consent decrees may have exceeded their objective. Even the Supreme Court explained that consent decrees are meant to preserve the transformative benefits of blanket licensing.[254]

David Israelite, the president and CEO of the NMPA recently scribed an

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[246] PRO Licensing, *supra* note 194, at 20.

[247] *Id.* at 22. The copyright office cited Pinkham v. Sara Lee Corp., 983 F.2d 824, 829 (8th Cir. 1992) ("[T]he apparent authority defense . . . is generally unavailable in the context of copyright infringement."); Fitzgerald Publ'g Co. v. Baylor Publ'g Co., 807 F.2d 1110, 1113 (2d Cir. 1986) (holding a putative licensee liable for willful copyright infringement for printing books containing alterations that exceeded the scope of the third party's grant from the copyright owner on the ground that "reliance [on terms in a third-party contract]—justified or otherwise—is irrelevant in determining whether [the printer] infringed [the publisher's] copyrights.").

[248] *Id.* at 21–22.

[249] *Id.* at 21.

[250] *Id.* at 20.

[251] Time Ingham, *This Group Despises 'Bad Behavior' By Music Publishers. Guess Who Funds It?*, MUSIC BUS. WORLDWIDE (July 7, 2016), http://www.musicbusinessworldwide.com/group-despises-bad-behavior-music-publishers-guess-whos-funding/.

[252] *See supra* Part III; Christopher Versace, *Music Publishers Continue to Seek Handouts Despite DOJ Sanctions*, FORBES (May 24, 2016, 1:18 PM), http://www.forbes.com/sites/chrisversace/2016/05/24/music-publishers-continue-to-seek-handouts-despite-doj-sanctions/#3c04915b3057.

[253] *A Closer Look*, *supra* note 223. "[T]he Department of Justice has decided that the best way to preserve competition and fairness in the music marketplace is to reject requests to inject anticompetitive behavior into music licensing consent decrees." Montgomery, *supra* note 237.

[254] DOJ Statement, *supra* note 20, at 7 (citing Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979)).

opinion editorial:[255]

> Today, songwriters are the most heavily regulated part of the music industry. A stunning 75% of their income is controlled by the federal government. . . .
>
> . . . .
>
> . . . Songwriters make so little from digital streaming services like Spotify that some artists like Taylor Swift have pulled their music from them altogether in protest. Meanwhile the "underdog" companies like Google who need DOJ to "protect" them from songwriters and are lobbying DOJ to keep the consent decrees in place, continue to benefit from below-market royalty rates.[256]

While the fate of fractional licensing rests in limbo, and the above analysis cites reasonable arguments from both sides, a bit of ancillary context may help relevant parties negotiate these complex and interrelated issues.

V. SECTION 114(I)

With fractional licensing pending appeal and the DOJ tabling partial licensing, it is clear that rate-setting is cause for concern. While economic theorizing may be helpful, empirical analysis more accurately predicts willing buyer, willing seller market rates. The obvious source of such data comes from the parallel public performance right for sound recordings. Currently, disparity between the treatment of sound recordings and songs is a source of animosity for publishers, whose sister-Labels often earn more favorable licensing rates, as depicted in Figure 1, below.[257] "For the time being, we see the sound recording

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[255] David Israelite, *Regulations Are Killing the Songwriting Stars*, FORBES (Mar. 18, 2015, 3:34 PM) http://www.forbes.com/sites/realspin/2016/03/18/regulations-are-killing-the-songwriting-stars/#918ae5326e86; *cf.* Versace, *supra* note 123.

[256] Israelite, *supra* note 255. "Huge tech companies would love to paint music publishers as power-wielding giants, but the reality is the entire publishing industry is worth around $2 billion annually, while Spotify alone was recently valued at over $8 billion. Or take the largest online music site, YouTube, which is valued at over $70 billion. (Don't forget that it's owned by Google, who spent almost $17 million in 2014 just on lobbying.)" *Id.*

[257] "[A] recurring complaint from publishers and songwriters is that significantly higher rates are paid for sound recordings than for musical works in the online world . . . ." MUSIC MARKETPLACE, *supra* note 13, at 136. "'[P]erformance royalties . . . are now being directed to labels because of the DMCA.'" Andrew Flanagan, *Record Labels Welcome Rise from Streaming, But Songwriters Aren't Smiling Yet*, BILLBOARD (Sept. 23, 2016), http://www.billboard.com/articles/business/7518839/record-labels-streaming-songwriters-publishers-less-revenue-not-smiling. "While the sound recording royalty rate has always been under fire as too low, the publishing rate is only around a tenth of that payout. When you read about an artist or songwriter complaining that her royalty check was only 35 bucks for three million streams, that's one of the reasons why." Bobby Owinski, *Apple's Publishing Royalty Proposal Takes a Shot at Spotify*, FORBES (July 18, 2016, 10:00 AM), http://www.forbes.com/sites/bobbyowsinski/2016/07/18/apples-publishing-royalty-proposal-shot-spotify/#61d7b27637a8; *cf.* Universal Music Group Revenue over the last 10 years with Universal

industry taking good advantage of the freedom they have to negotiate individually and directly with the digital service providers the price for the commercial exploitation of their recordings while ASCAP and BMI are restricted by [c]onsent [d]ecrees."[258]

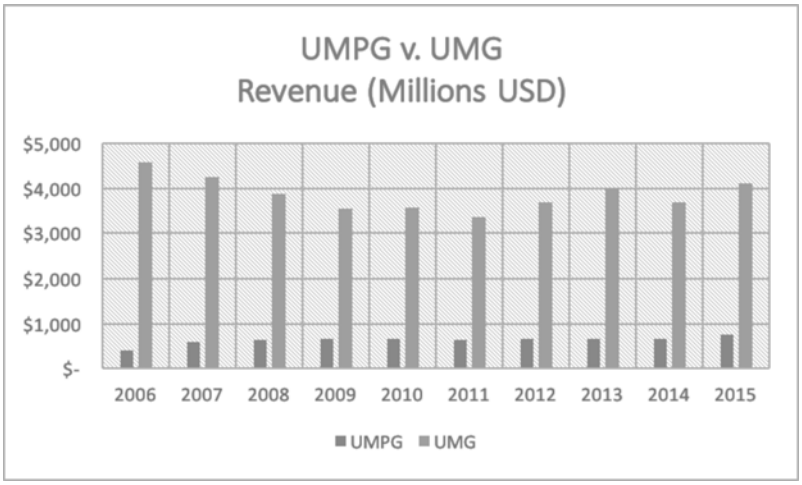

Figure 1[259]

In 2015, U.S. PROs collected roughly $1.4 billion, $100 million of which came from online, digital uses.[260] Foreign affiliated PROs collected an additional $700 million for their U.S. affiliated PROs.[261] Most estimates place 2015 public performance revenues somewhere around $2.1 billion.[262] Of the exclusive rights granted to songwriters, the right to publicly perform musical works recently surpassed the traditional cash cow for music publishers,[263] the Mechanical[264] license, in terms of revenue, stemming directly from the influx in stream-

Music Publishing Group. Ed Christman, *Universal Music Group Revenues Up Nearly 4 Percent This Year*, BILLBOARD (Nov. 9, 2016) http://www.billboard.com/articles/business/7572677/universal-music-group-revenues-earnings-2016-q3-vivendi-streaming.

[258] Marisa Gandelman, *Antitrust Consent Decree Review*, UNIAO BRASILEIRA DE COMPOSITORES 2 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307681.pdf.

[259] Tim Ingham, *Streaming Killing the Music Business? UMG Just Posted its Biggest Revenues in a Decade*, MUSIC BUS. WORLDWIDE (Feb. 21, 2016), http://www.musicbusinessworldwide.com/umg-just-posted-its-biggest-revenues-in-a-decade/ (See Figure 1).

[260] Brabec, *supra* note 33.

[261] 31 AM. B. ASS'N 4, 1, 37–42 (2015).

[262] *Id.*

[263] *Id.*

[264] Mechanical licenses (Mechanicals) grant the licensee the right to reproduce a song in a physical format. PASSMAN, *supra* note 13, at 229.

ing services.

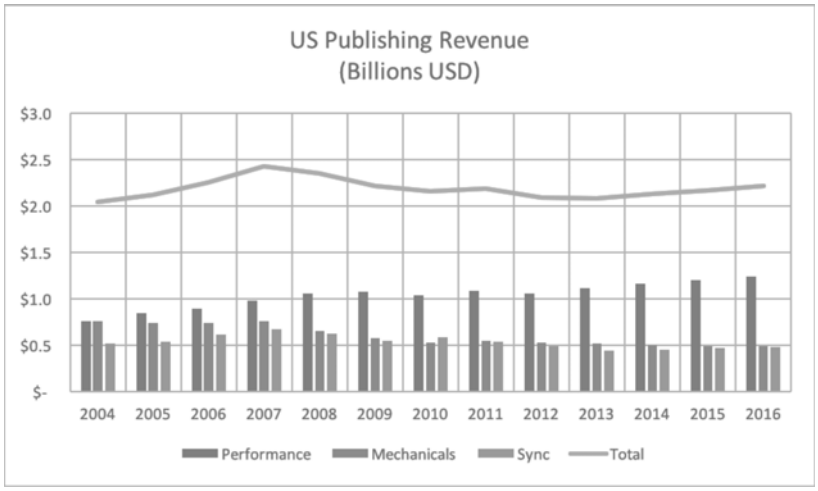

Figure 2[265]

Global recorded music sales for 2015 were $15 billion.[266] The Recording Industry Association of America (RIAA) cites 2015 U.S. recorded music revenues at $7.016 billion, up from $6.951 billion in 2014, with streaming accounting for 34.3 percent of recorded music revenue, up 46.5 percent on the year.[267] While the last 45 years saw a pronounced spike in recorded music revenues at the end of the millennium, nominal earnings seem to have stabilized since the dotcom bubble, as depicted in Figure 3, below.

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[265] *US Music Publishing 2014–17*, ENDERS ANALYSIS (May 2015), http://www.endersanalysis.com/content/publication/us-music-publishing-2014-17.

[266] *Global Statistics*, IFPI (2015), http://www.ifpi.org/global-statistics.php.

[267] Ed Christman, *U.S. Recording Industry Sees Slight Uptick in Revenue Last Year, Streaming Dominates Digital*, BILLBOARD (Mar. 22, 2016), http://www.billboard.com/articles/business/7271729/riaa-us-recording-2015-revenue-numbers. Downloads sales made up over 34 percent of revenues and 28.8 percent of those revenues came from physical sales. *Id.* "[U]nit counts for albums fell to 109.4 million from 117.6 million, a 7 percent decline . . . ." *Id.* "Paid subscription revenue increased from 52.3 percent, to $1.22 billion . . . ." *Id.*; Glenn Peoples, *Streaming is Everything, and Everyone Seems to Think It Has an Advertising Problem*, BILLBOARD: BULLETIN (Mar. 23, 2016), http://www.billboard.com/files/pdfs/Bulletin/march-23-2016-billboard-bulletin.pdf.

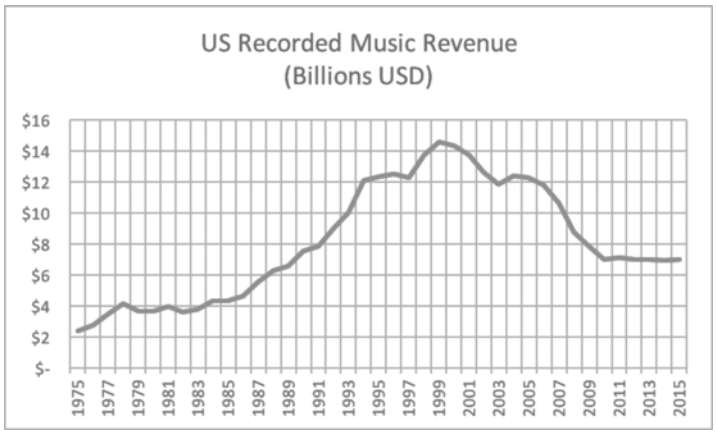

Figure 3[268]

If one compares the revenues of record Labels with publishers, the disparity is immediately apparent. The nominal revenues from U.S. sound recordings and songs provide greater clarity when compared to nominal GDP. Surprisingly, Figure 4 depicts a drastic drop in recorded music earnings as a part of GDP compared to a relatively stable publishing revenue stream, thus signaling a move towards parity. What may be less apparent, however, is that after 2010, publishing revenues declined at rate effectively twice as fast as sound recording revenues. What is most troubling is that both Labels and publishers are losing ground in the music market.

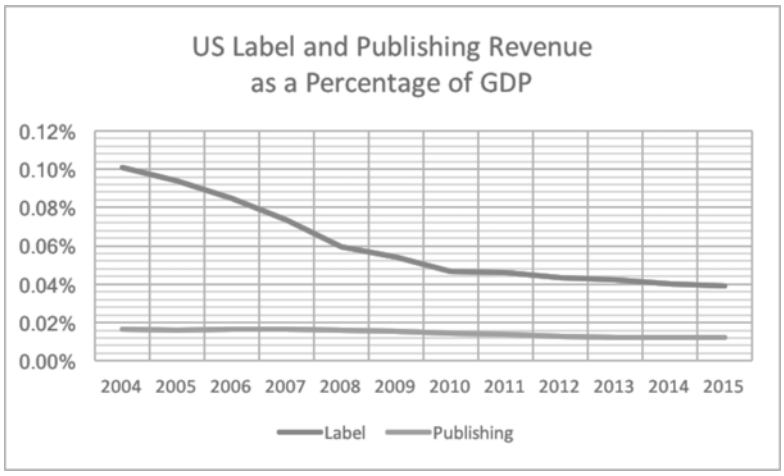

Figure 4[269]

[268] *U.S. Sales Database*, RIAA, https://www.riaa.com/u-s-sales-database/ (last visited Feb. 4, 2017).

More closely connected with the purpose of this Comment, is the value of recorded music public performances in comparison to musical work public performances. The nearly asymptotic rise of U.S. sound recording public performance revenue only further proves label-side dominance over the marketplace.

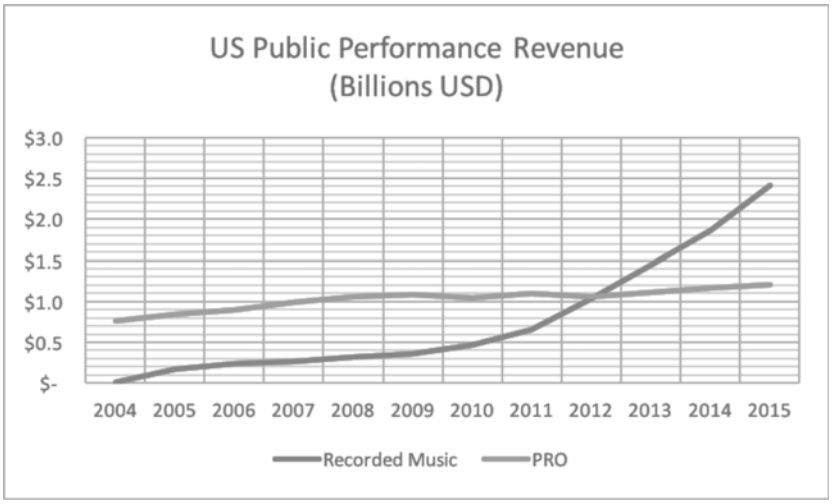

Figure 5[270]

For further anecdotal evidence of the disparity between sound recordings and songs, the 1.85% licensing rate Pandora earned in the ASCAP rate court solidified a payment standard where roughly 50% of Pandora's revenues went to pay for sound recordings versus 4% for songs.[271] In other words, of the $610 million Pandora paid in licensing fees, only $45 million went to PROs.[272] In 2016, Pandora agreed to pay about 7% of its revenues to publishers/songwriters, equaling roughly one fifth of the monies paid to Labels/artists.[273] Thus, of Pandora's $700 million going to rights holders, roughly $140 million would go to PROs.[274] Regardless of conciliatory measures, how could these ratios be so lopsided?

To be sure, Labels invest more in market and artist development than their

[269] *US Music Publishing 2014–17*, *supra* note 265; *U.S. Sales Database*, *supra* note 268.

[270] *US Music Publishing 2014–17*, *supra* note 265.

[271] *See In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 343 (S.D.N.Y. Sept. 17, 2013).

[272] *See* Tim Ingham, *Pandora is Now Paying Publishers 1/5 of the Money it Gives Labels*, MUSIC BUS. WORLDWIDE (Feb. 17, 2016), http://www.musicbusinessworldwide.com/pandora-is-paying-major-publishers-fifth/.

[273] *Id.*

[274] *Id.*

publishing counterparts. The International Federation of the Phonographic Industry (IFPI) estimated that, "music labels invested more than $4.5 billion in both artists and repertoire, or A&R, and marketing in 2015."[275] But such investments do not seem to warrant a five-to-one split in royalty payments for the underlying work. Some of the blame may lie with publishers for failure to communicate with Labels under the same corporate parent.[276] Labels, in extracting unreasonably high fees, depleted the pots available to pay royalties, leaving songwriters with little remaining for distributions.[277] While digital service providers may have some room to pay songwriters greater percentages, those margins are likely already limited.[278] Song parity "has been foreclosed by preexisting label deals that siphoned 50% of gross revenue (and authorized the 'free tier')."[279]

More blame may be placed on the rate courts. While the aim should be to find rates "that will give composers [the] economic incentive to keep enriching"[280] society, the great disparity between recently requested rates and actual rate court determinations may indicate otherwise. In *ASCAP v. MobiTV*, the court held that ASCAP was entitled to a $400,000 licensing fee rather than the requested $41 million over six years.[281] In *BMI v. DMX Inc.*, BMI proposed a blanket license fee of $41.81 per licensee's location use and DMX countered with $11.32.[282] The court set an $8.66 per location fee and an $18.91 adjustable-fee blanket license.[283] While BMI presented evidence of rates set with competitors at and above its requested price, the court cast that evidence aside, arguing,

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[275] Daniel Adrian Sanchez, *Report: $2 Million Required to 'Create' an Artist Success (In One Market)...*, DIGITAL MUSIC NEWS (Nov. 30, 2016), http://www.digitalmusicnews.com/2016/11/30/ifpi-win-report-invesment-4-5-billion/.

[276] *See supra* Figure 1.

[277] Public Knowledge, *supra* note 164, at 17–21 (citing the demise of the digital music service Beyond Oblivion, which filed for bankruptcy with $50 million in outstanding debts to Sony Music Entertainment and Warner Music Group).

[278] "There is a finite pot of money that any streaming service can pay out in royalties—after paying label payments, enormous overhead costs in technology and maintenance, and profits to the investors. Direct licensing would not increase the pot. But it would have opened the door for publishers to extract label-size huge advances (that would not be shared with songwriters) and structure deals with the streaming services that would minimize the flow-through of writers' share of these royalties. The only way for songs to achieve royalty parity with recordings is for the labels to give back part of the royalty pool." Dunitz, *supra* note 205.

[279] *Id.*

[280] *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 321 (S.D.N.Y. Sept. 17, 2013) (quoting *In Re* Application of MobiTV, Inc., 712 F. Supp. 2d 206, 209 (S.D.N.Y. 2010), *aff'd sub nom.* Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Incorporation, 681 F.3d 76 (2d Cir. 2012)).

[281] Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Incorporation, 681 F.3d 76 (2d Cir. 2012).

[282] Broad. Music, Inc. v. DMX, Inc., 683 F.3d 32, 39 (2d Cir. 2012).

[283] Broad. Music, Inc. v. DMX, Inc., 726 F. Supp. 2d 355, 367 (S.D.N.Y 2010).

through logical leaps, that those rates did not adequately reflect the market.[284] Furthermore, as the Pandora rate court example of Part III confirms, Judge Cote reasoned that because UMPG "control[ed] roughly 20% of the music market," the negotiation did not represent "a willing buyer and seller" transaction,[285] thereafter defining a 1.85% rate of revenue instead of the 3% rate requested. With such drastic disparities, it seems difficult to understand how the rate courts could consider these licensing rates reasonable. The answer to this conundrum may be congressional action.

Section 114(i) of the Copyright Act of 1976 prohibits rate courts from considering licensing rates for the digital performance of sound recordings to protect the value of the public performance of songs.[286] When the sound recording gained the exclusive right to digital public performance in the Digital Performance Right in Sound Recordings Act (DPRA),[287] Congress intended to protect the value of songwriters' compositions.[288] This likely seemed reasonable because no market for the public performance of sound recordings existed prior to DPRA. Thus, if courts could have set rates against a nascent copyright, the lack of demand for sound recordings could have been used to depress the public performance rate. While this theory may have been sound for the exact situation just described, it seems that Congress failed to anticipate, or chose to ignore, a situation where the value of *songs* was artificially depressed because courts could not reference a mature *sound recording* market, rending § 114(i) antithetical to its proposed function.[289]

The Copyright Office has expressed its bewilderment at § 114(i)'s use. "[T]he Office does not understand why, absent such a restriction, it might not be relevant to consider sound recording royalties in establishing a fair rate for the use of musical works[,] should a ratesetting authority be so inclined."[290] When the Copyright Royalty Board for public performances of digital sound recordings sets its rates, it *is* permitted to review the rates granted for compositions.[291]

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[284] *Broad. Music, Inc.*, 683 F.3d at 48.

[285] Noah Hubbell, *One Label Controls Almost All of Hip-Hop, and That's a Problem for Music Fans*, WESTWORD (Mar. 5, 2014 6:07 AM), http://www.westword.com/music/one-label-controls-almost-all-of-hip-hop-and-thats-a-problem-for-music-fans-5718912.

[286] 17 U.S.C. § 114(i) (2012) ("License fees payable for the public performance of sound recordings . . . shall not be taken into account in any . . . proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."); see also *id.* at § 106(6).

[287] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104–39, § 4, 109 Stat. 336, 344–48 (1995) (codified at 17 U.S.C. § 106(6)).

[288] *The Performance Rights in Sound Recordings Act of 1995: Hearing on S. 227 Before the S. Comm. on the Judiciary*, 104th Cong. 33 (1996).

[289] *Id.* at 13; BMI Comments, *supra* note 153, at 11.

[290] MUSIC MARKETPLACE, *supra* note 13, at 157.

[291] Joseph Pomianowski, *Toward an Efficient Licensing and Rate-Setting Regime: Recon-*

David Israelite summarized the issue: "'When labels negotiate, they set their terms and if they don't like them, they get to say no' . . . . 'The songwriters and publishers are operating under a patchwork of antiquated regulations that don't allow them to say no.'"[292] Matt Pincus, CEO of the independent company SONGS Music Publishing, explained that in synch licensing, the one place where publishers are allowed to negotiate without consent decree regulations, publishers "get fifty-fifty—the same as the labels."[293] These ideas sparked the Songwriter Equity Act (SEA) of 2015, which among other goals, aims to amend 17 U.S.C. § 114(i) to allow rate courts to consider royalties for sound recordings.[294] While practitioners wait for Congress to act, the DOJ and the rate courts must find an alternative solution to decrease songwriter and artist income disparity for public performances.

VI. LOSE/WIN

An obvious solution to songwriters' depressed bargaining is revision or removal of § 114(i). However, as Representative Doug Collins already introduced the SEA to the House of Representatives,[295] this Comment will focus on separate corrective measures.

Perpetual consent decrees serve a limited but necessary function in the music industry. ASCAP and BMI's history is rife with antitrust complaints, but the Constitution does explicitly grant monopoly power to "promote the Progress of Science and the useful Arts . . . ."[296] PROs play a fundamental role in the administration of this monopoly power, a role the Supreme Court explicitly acknowledged in *BMI v. CBS*.[297] As a counterbalance to such powers, consent decrees keep ASCAP and BMI's market concentration in check. While legal issues buttress arguments from both sides of the debate, the fundamental issue is economic: are songwriters getting paid enough? As with most negotiations, the solution lies somewhere between opposing forces. This Comment encourages songwriters to cede some ground in exchange for long term gains?

The DOJ interpreted the current consent decrees to require 100% licensing. It premised its argument on copyright law. Co-owners of a copyright are treated as tenants in common, able to license non-exclusive uses of their entire

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structing § 114(i) of the Copyright Act, 125 YALE L. J. 1531, 1536 (2016).

[292] Andrew Flanagan, *Record Labels Welcome Rise from Streaming, But Songwriters Aren't Smiling Yet*, BILLBOARD (Sept. 23, 2016), http://www.billboard.com/articles/business/7518839/record-labels-streaming-songwriters-publishers-less-revenue-not-smiling.

[293] *Id.*

[294] H.R. 1283, 114th Cong. (2015).

[295] *Id.*

[296] U.S. CONST. art. 1, § 8, cl. 8.

[297] Broad. Music, Inc. v. CBS, 441 U.S. 1, 13 (1979).

work, provided pro-rata shares of revenue are paid to all co-owners. True, the intermediary step of the PRO as an agent is missing from this analysis, but this is not an insurmountable legal burden, particularly when the agent is working on behalf of the tenancy. Separately, in a consolidated PRO market, the race-to-the-bottom argument seems to be a red herring. With two major PROs, if one PRO dropped its licensing rates to undercut its competition, publishers would withdraw their catalogs in favor of the alternative PRO, maybe even moving to SESAC or GMR. It seems that PROs, aware of this race-to-the-bottom concern, would actively attempt to prevent such results. Independently, parties are free contract to negate this tenancy-in-common default. Likely, a determination that ASCAP or BMI's consent decrees must offer 100% licensing may only affect those songs with writers staggered between ASCAP and BMI, whereas writers from SESAC and GMR, outside of the privity of the consent decrees, will be unaffected.

Of course, songwriters, publishers, and PROs would hope to avoid 100% licensing, but if courts are to accept the DOJ's support of 100% licensing, serious concessions must be reciprocated. Luckily, the DOJ specifically tabled the partial licensing discussion, emphasizing that it "remains open to considering these modifications at a later date."[298] Despite the publishing industry's general sentiment assuming foreclosure of further partial withdrawal discussion, the DOJ went out of its way to reference further review.

If copyright serves to instruct decisions regarding fractional licensing, it too may instruct partial licensing. While the Second Circuit specified that "the plain language of the consent decree unambiguously precludes ASCAP from accepting such partial withdrawals,"[299] the DOJ has the authority to recommend amendments to the consent decrees removing such preclusive language. Once the proverbial dust settles from the fractional licensing debate, the DOJ should commit to recommending amendments permitting partial withdrawal.

Before the consent decrees, both PROs "forbade their members from entering into direct licensing arrangements,"[300] but through the consent decrees, both PROs agreed not to take exclusive rights.[301] Copyright owners were free to license directly to users while simultaneously using the services of their affiliated PRO.[302] Owners maintain the "free[dom] to alter th[eir] statutory allocation

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[298] DOJ Statement, *supra* note 20, at 17; Randy J. Stine, *NAB Gets Update on DOJ Proposal*, RADIOWORLD (July 8, 2016), http://www.radioworld.com/article/nab-gets-update-on-doj-proposal/279200.

[299] Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers, 785 F.3d 73, 77 (2d Cir. 2015).

[300] MUSIC MARKETPLACE, *supra* note 13, at 35–36. This was provided that there was a written request. *Id.*

[301] PASSMAN, *supra* note 13, at 246.

[302] *Id*. The consent decrees also exempted movie theaters. *Id.*

of rights and liabilities by contract,"[303] and that contract need not be unreasonably restricted. Partial withdrawal should garner parity in licensing.

If the Second Circuit decides to side with the DOJ on fractional licensing, the DOJ should split the difference and recommend amendments to permit partial withdrawal. Songwriters would take a loss and a win, hopefully appeasing all parties, for the time being.

VI. CONCLUSION

"[N]obody seems to question the basic premise that royalty rates *should* reflect fair market value."[304] But how does one balance the rights of consumers with the songwriters' right to fair remuneration? Due to the constant piecemeal changes in the music industry, it is difficult for parties to predict what legal changes will render "fairness." Without Congressional action amending or removing § 114(i), the Second Circuit and the DOJ must take steps to grant the creators of the actual product for which copyright is premised to incentivize a more equal slice of the royalty pie. Based on the depressed rates songwriters receive in comparison to their artist counterparts, change is evidently required. But drastic change might shake the industry. If the courts and the DOJ use copyright law to guide their analysis, such continuity may lead to a small loss for songwriters in the fractional licensing debate, but possibly greater gains in partial withdrawal. Regardless of manner, most agree that the end goal should be to create more parity between the earnings of songwriters and their artist counterparts, while also protecting consumers from anti-competitive PRO behavior.

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[303] PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 4:7 (3d ed. 2005).

[304] *U.S. Sales Database*, *supra* note 268.